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In the Supreme Court of the United States

October Term, 1983

JAMES T. LICAVOLI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

I. Whether due process and basic fairness were grievously offended when the government was unnecessarily permitted to affirmatively and dramatically prove: (A) that in issuing the warrant authorizing the monitoring of conversations a Federal Judge, the Attorney General and the FBI were fully convinced a named individual would be personally participating in conversations in his home involving serious and violent crimes. And (B) that the Attorney General had been fully convinced by the FBI and others that certain prosecution witnesses, as well as, their families, not only deserved but were actually entitled to be protected so as to prevent this individual from visiting physical harm upon them.

II. Does a trial court err, or abuse its discretion, when it fails to grant the accused a severance in a situation where it was clearly evident compelling prejudice would be visited on him that would outweigh all interest in judicial economy and other relevant considerations.

III. Whether the defendant Licavoli's right of confrontation and hearsay rule were violated by the admission of considerable evidence showing the contents of various conversations had by a non-testifying declarant (a co-defendant at the trial) with the witnesses Aratari, Guiles and Lanci, during which Licavoli was repeatedly credited with ordering the murder of Danny Greene.

IV. Whether in a multiple defendant RICO conspiracy prosecution it is proper to charge the jury that a defendant could be found to have committed the

charged predicated acts of (a) conspiracy to murder a particular individual and (b) the murder of this same individual; as well as, the RICO conspiracy itself on an aider and abettor theory.

V. Whether a charge that exposes an accused to being convicted by less than the unanimous concurrence of all the jurors violates the sixth amendment right to a unanimous verdict.

VI. Whether the evidence in a RICO conspiracy prosecution that at best only shows a particular defendant committed *only* one of the alleged predicate acts, or offenses, is legally sufficient to support a verdict finding such guilty as charged.

A. Whether "conspiracy to murder" can properly be regarded as a predicate act in a RICO conspiracy prosecution.

B. Whether the two predicate acts requirement of 1962 (d) can be satisfied by proof of the State offenses of conspiracy to murder *and* murder of a particular person, where under State law upon conviction of the murder charge the conspiracy offense merges therewith.

C. Whether the requirement, under 18 U.S.C. §1961 (1) (A), that a State offense must be "chargeable" and "punishable" can be satisfied by proof of offenses that cannot be separately punished.

PARTIES BELOW

The caption of this case not containing the names of all parties whose convictions are sought to be reviewed, the following co-defendants' names are disclosed:

(1) Anthony Liberatore

(2) John Calandra

(3) Pasquale Cisternino

(4) Ronald Carabbia

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, James T. Licavoli, respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit, which judgment became final on January 9, 1984.

OPINION BELOW*

The Opinion of the Court of Appeals (Appendix "B", *infra*, pp. A2-A25) is reported as *United States v. Licavoli, et al.*, 725 F.2d 1040 (6th Cir. 1984).

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1984. Upon application by petitioner the time for seasonably filing this Petition was extended until April 8, 1984 (See Appendix "A", at A1). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant statutory provisions involved are: Federal Rules of Criminal Procedure, Rules 14, 30 and 31(a); Federal Rules of Evidence, Rules 404 (a) and 801 (d) (2) (E); Ohio Revised Code §§2923.01 (A) (1) (2), 2923.01 (F) and 2923.01 (G); 18 U.S.C. §2 (a), 18 U.S.C. §2 (b), 18 U.S.C. §1961 (1) (A) and 18 U.S.C. §1962 (d). (See Appendix "E", pp. A73.)

STATEMENT OF THE CASE

I

In the trial of this case the government sought to prove that James Licavoli, the petitioner, violated 18 U.S.C. §1962

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*Whenever reference is made to a page in the transcript of the proceedings in the trial court, it will be designated (Tr. .....). References to the Joint Appendix filed in the Court of Appeals are (J. A. .....). Reference to the Appendices to this Petition are noted as Appendix A, B, C, and D, with a page reference of A .....

(d) by conspiring to violate 18 U.S.C. §1962 (c). As against Licavoli, the charge was amplified by the very specific contention that he was conspiratorially involved in conducting the affairs of an enterprise, as that term is defined in 18 U.S.C. §1961 (4), through a pattern of racketeering activity—that is, through the commission of two (2) state offenses: *conspiracy to murder* and the *murder* of one Danny Greene.

Prior to the trial the Court ruled that Licavoli's acquittals on the bribery charges barred the government from using any of the bribery evidence against him for any purpose. However, as is made most clear below, the Court adamantly refused to separate Licavoli's trial from those defendants (*i.e.*, Liberatore and Ciarcia) against whom the bribery evidence was admissible as proof of "predicate acts" and as proof of the charged "enterprise". It also happened that the considerable bribery evidence was admitted as proof these bribery charges were committed in furtherance of the affairs of that enterprise *as charged in the indictment.*

Most critical to this cause then is the trial court's written response to Licavoli's post-trial contention that:

> The court erred in denying this defendant's various objections to the use of *his name* in connection with the stolen FBI documents that related solely to the various acts of bribery charged in this cause against certain co-defendants. This evidence (which disclosed in glaring and indelible terms the rather gross fact that Licavoli had been, and was being, very actively investigated by the FBI, doubtless as a suspected criminal) in addition to impermissibly putting his character in issue, created other powerful negative inferences that could in no way be addressed by this defendant consistent with his right of confrontation and his entitlement to due process.

Here, the trial Judge reasoned, in clear and unambiguous prose, that:

> In developing the proof of bribery with reference to confidential FBI documents stolen from the FBI files by Geraldine Rabinowitz and given to defendant Kenneth Ciarcia, the government called Geraldine Rabinowitz, a file clerk in the Cleveland office of the FBI. Shortly after her testimony began, the court gave this limiting instruction to the jury:
>
> * * * * *
>
> > The jury, therefore, will not consider testimony or evidence received from Geraldine Rabinowitz as applying to defendants Licavoli, Calandra, Cisternino, or Carabbia. You may proceed Mr. Poretz.
>
> Tr. at p. 201. It was anticipated that some of her testimony would refer to Mr. Licavoli. This instruction, therefore, informed the jury that none of the testimony or evidence so received from Geraldine Rabinowitz was to be considered as applying to defendant Licavoli.
>
> * * * * *
>
> Thereupon she mentioned the names "James Licavoli, Anthony Liberatore, and himself, Kenneth Ciarcia." Mr. Ciarcia also told her that Mr. Licavoli went by the name of "Jack White."
>
> After checking certain files at the Cleveland FBI office, she told Mr. Ciarcia there was . . . "an active investigation on Mr. Licavoli."
>
> Upon persistent inquiry of Mr. Ciarcia, she testified, she eventually obtained copies of several reports on James Licavoli and turned these over to Mr. Ciarcia. Subsequently, Mr. Ciarcia said he wanted additional information on Mr. Licavoli so that there could be a comparison of numbers on the report. She said that

she obtained another report on Mr. Licavoli and gave it to Mr. Ciarcia.

The references to Mr. Licavoli were an integral part of Geraldine Rabinowitz's testimony. Any effort to separate or delete these Licavoli references would have impaired if not destroyed the content of her testimony. Moreover, it would have been impractical, if not impossible, for her to attempt, pursuant to instructions, to substitute the term "another person" in place of the name James Licavoli. (J. A. 170-172).

This factual background, coupled with the indisputable finding by the trial court that the use of Licavoli's name was such an integral part of the central bribery witness' evidence its elimination would have "impaired if not destroyed its content" (*Ibid.*), makes the position taken by the Court of Appeals on this point a "cop-out". Here reference is made to the absolutely horrible conclusion, by the Sixth Circuit, that:

> [The] testimony regarding the other defendants in connection with the circumstances of the bribery was *tangential,* and overshadowed by the major role in the events played by Liberatore and Ciarcia. *The slight potential prejudice to defendants Licavoli,* Calandra and Cisternino in this case *by these tangential references is outweighed by the judicial and societal interests in trying all of the defendants together.* We hold that the trial judge did not abuse his discretion in denying defendants' motion for severance. (*Licavoli,* at 1052; Appendix "B", at pp. A21-A22.)

II

During the trial Ferritto absolutely refused to testify and was declared "unavailable" as a witness. This prompted the Court, despite most vigorous and persistent objections, to allow the government, under favor of Rule 804 (a) (1), to read a segment of the testimony given

by Ferritto during Licavoli's state murder trial. The wrongs involved in reading Ferritto's testimony against Licavoli were compounded by the fact that testimony given by Ferritto at other trials in which Licavoli was not a defendant, was also read to the jury.

The utilization of this procedure was the subject of other and further Motions for Severance. In so doing, hearsay and confrontation arguments were punctuated by the contention that the jury perforce would be confounded by this evidence and that no instruction could possibly insure its correct compartmentalization. Also, the point was made that the defense cross-examination of Ferritto at the state court trial was not tailored to meet the "enterprise" aspect for which the government was able to utilize this evidence (Tr., pp. 1500-1517, 1591-1614).

III

Other relevant facts show the Court allowed the government to repeatedly establish that the monitoring devices placed in Licavoli's home were pursuant to court order and that all of the protected witnesses and their families, in the opinion of the Attorney General, absolutely needed to be protected from Licavoli (Tr., pp. 5429-5431). And, the Court allowed the government to compellingly demonstrate and, otherwise wilfully insinuate, the numerous documents for which the FBI clerk was bribed were but a small segment of the investigative files compiled over the years on the "criminal" activities of Licavoli. Still other proof showed the list of informers was specifically sought by the "bribers" so they could interpret these various "Licavoli" documents. Since this fact was developed over Licavoli's protest it emphasizes the extent to which he was devastated by evidence that was clearly inadmissible against him.

The fact that none of the bribery evidence would have been admitted *against* Licavoli had he been tried

alone aggravates the prejudice he was literally required to endure. This fact becomes even more manifest in view of the fact that Liberatore was actually *credited* with having told Aratari more than once *after* Greene's death that *if they killed the rest of the Irish crew they would have the town and Licavoli would not know about it.* Obviously, this statement hardly shows Licavoli had a stake in their ventures.

REASONS FOR GRANTING THE WRIT

The Court most assuredly should review the rulings made below, first of all because in some respects they strike at the very heart of an individual's right to be convicted, if at all, in a fair trial. And, because some of the critical rulings and interpretations rendered below are in serious conflict with settled precedents developed in this court for application in RICO prosecutions.

For starters in this case, despite the precise pronouncements in *United States v. Turkette,* 452 U.S. 576 (1981), that a RICO enterprise requires proof of "an entity separate and apart from the patterns of activity in which it engages" (*Id.*, 583) that functions "as a continuing unit" (*Ibid.*), the Court below is convinced that "the enterprise element, in the light of Turkette has become a fiction. . . ." And, that "the two predicate offenses are the 'Enterprise' ". As that court saw it, "[a]ll that is now required is the commission of two predicate offenses . . . . No further indicia of 'Enterprises' is now necessary." *Licavoli,* 725 F.2d, at 1053; Appendix "B", at A25.

This ruling obviously conflicts with *Turkette.* Since no other circuit has articulated this notion, it puts the Sixth Circuit in open conflict with *United States v. Riccobene,* 709 F.2d 214 (3rd Cir. 1983) and *United States v. Cauble,* 706 F.2d 1322 (5th Cir. 1983). Also see *United States v. Lemm,* 680 F.2d 1193 (8th Cir. 1983) and *United States v. Bledsoe,* 674 F.2d 647 (8th Cir. 1982).

Also, as various other arguments made below show, the Petitioner was actually prevented from having a fair trial because it was much easier to subordinate due process for him to "competing societal goals of efficient and speedy trials" (*Licavoli*, 725 F 2d at 1051, Appendix "B", at A21).

The argument is made below (Number I) that there is no way any jury could properly accept all the evidence in this case that was so limited and qualified by countless instructions for any light it might shed on the narrow purposes for which it was admitted and reject its grossly prejudicial impact in all other areas. For our part, the metaphysical acumen capable of making discriminations so subtle and sophisticated, a feat beyond the compass of ordinary minds, simply cannot be imputed to the jury that convicted Licavoli. See *Shepard v. United States*, 290 U.S. 96, 104 (1933).

This is particularly so here because the constantly reverberating clang of the impermissable uses to which this evidence may have been put is more than sufficient to drown out the far weaker sounds made by the effect of the Court's special instructions. Stated still another way, if there are limits on the powers of jurors—or even Judges and the rest of us—to keep interconnected thoughts separated, then those limits surely were exceeded here. Since any authorized use of this evidence, particularly the bribery evidence, shaded so closely and uncontrollably into forbidden areas it is a safe assumption that the Court simply asked too much of these jurors when he asked them to perform, what was said to be, "a mental gymnastic which is beyond, not only [a jury's] powers, but anybody's else." *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932).

Since some of the evidence, particularly the bribery evidence, was not properly admissible against Licavoli for any purpose, the argument is made (No. II) that the Court

abused its discretion in failing to sever Licavoli for trial from those Defendants against whom the bribery evidence was most essential. The prejudice to Licavoli resulted, first of all from the spillover, or slop over, effect caused by this bribery evidence. And, it resulted, not only in portraying him as a sinister person, but in enhancing the risk (since his name was indeed centralized throughout the bribed for documents) that the government's enterprise theory actually gained still another *unentitled* benefit in its wake.

In the next argument (No. III), the points hopefully made show there was insufficient independent proof of conspiracy as between Licavoli and Liberatore to justify the admission of certain testimony under Rule 801 (d) (2) (E). It is further argued that Licavoli's confrontation rights were not satisfied. *Dutton v. Evans*, 400 U.S. 74 (1970).

The attempt is then made (No. IV) to show there are critical and discernible distinctions that must be made as between a conspirator and an aider and abettor. The upshot of our analysis is that while *Pinkerton v. United States*, 328 U.S. 640 (1946), makes all conspirators liable for crimes committed in furtherance of such conspiracy, an agreement to violate the law remains the gist, or gravaman, of the offense and is an indispensable element. Since one can be an aider and abettor and not a conspirator, the verdict cannot survive the meaningful possibility that the jury reasoned Licavoli was only an aider and abettor and need not be a conspirator.

Other arguments (Nos. V and VI) raise the point that under the instructions given the jury could return a guilty verdict against Licavoli that lacked the unanimous concurrence of all the jurors as to any specific theory. And, that the evidence is insufficient for a number of reasons to support a finding that Licavoli was guilty of the charged offense.

I. Fundamental Due Process and Basic Fairness Were Grievously Offended When the Government Was Unnecessarily Permitted to Affirmatively and Dramatically Prove: (A) That in Issuing the Warrant Authorizing the Monitoring of Conversations That Would Take Place Inside Licavoli's Home, a Federal Judge, the Attorney General and the FBI Were Fully Convinced Licavoli Would Personally Be Participating in Conversations Involving Serious and Violent Crimes. And (B) That the Attorney General Had Been Fully Convinced by the FBI and Others That Certain of Its Witnesses, As Well As Their Families, Not Only Deserved but Were Actually Entitled to Be Protected So As to Prevent Licavoli From Visiting Physical Harm Upon Them.

(A)

Here, we start with the idea that Licavoli most assuredly did *not* put his character in issue as is required by Rule 404 (a), Federal Rules of Evidence, as condition precedent to an affirmative attack being made on it. Yet, it can hardly be denied the impact of the evidence being centralized had the unavoidable effect of portraying Licavoli to the jury as an out and out public menace for whom guilt was such a foregone conclusion in the eyes of our government that the trial itself was a mere formality.

Thus it is most significant the various monitoring agents were able to emphasize with the court's blessings, they were acting under Court order *and* that one of the limitations in the order restricted them to only monitoring these conversations that related to "criminal activity." (Tr., pp. 6018, 6033-6034).

In arguing against the admission of any of this evidence, the following cogent points were made by the defense: the court order was not under challenge before the

jury, hence, no need existed to show what was done had the prior approval of the court. And, just as surely there was absolutely no need to tell the jury these agents were to only listen to conversations related to "criminal activities". This indication carried with it the unavoidable and irrepressible message that these trained agents regarded anything actually heard as relating to "criminal activities" (*Id.*, 6023). Also, the contention made then, and now, is that the government's resort to this egregious procedure was both deliberate and unnecessary (*Id.*, 6024). Finally, in the midst of all this, not only was Rule 404 specifically called to the court's attention (*Id.*, 6028), the court was informed again that counsel should not be held responsible for the questions asked by other counsel that emphasized the wrong this debacle visited upon Licavoli (*Id.*, 6029-6030).

(B)

More than once the Court charged the jury that the U.S. Attorney General had in fact made the critical determination that the mere willingness of certain witnesses to testify against Licavoli "would place his life or person or the life or person of a member of his family or household in jeopardy" (See Tr., 5429-5431). The pernicious inference that quite predictably emerged from these instructions translates into a sort of *judicial vouching* for the integrity of the Administration's decision to grant the annuities, and other meaningful considerations (including in some instances absolution) that were given these admitted criminals.

All this makes it most clear Licavoli was victimized by this unfortunate tactic as well.

II. Where It Was Most Evident Compelling Prejudice Would Be Visited, As It Was Here, on an Accused That Would Outweigh All Interest in Judicial Economy and Other Relevant Consid-

erations, a Trial Court Errs, or Abuses Its Discretion, When It Fails to Grant the Accused Victimized Thereby a Severance.

Here we refer to the prejudicial spillover that perforce resulted from evidence relating to various crimes and acts not charged against this defendant and from other evidence only admissible against other defendants. Also, there was unavoidable confusion of the evidence admissible against Licavoli with that admitted only as against other defendants.

It is also contended that the joint trial of Licavoli on the RICO conspiracy charge based on *only* the predicate acts involving (1) conspiracy to murder and (2) the murder of Danny Greene, along with co-defendants Liberatore and Ciarcia, against whom certain additional predicate acts (*i.e.*, the bribery charges) were also litigated, was grievously predjudicial to Licavoli. Not the least of the reasons why this is so is because necessarily there was such a confusion of charges, evidence and defendants as to make the proper compartmentalization thereof far too risky a proposition.

Here, it is most relevant that even before this trial commenced, the joint trial of these defendants (most of whom had been acquitted on the Bribery charges that would be centralized in the trial) clearly foreshadowed that there would be confusion of the evidence and resulting prejudice particularly to Licavoli—one of those who had been acquitted. This fact the trial court fully recognized.

The above described circumstances were aggravated not only by virtue of Ferritto's refusal to testify and the debacle that developed as a consequence, but also by the fact that Licavoli's name was at the fulcrum of the various requests made of the "bribed" FBI clerk for the documents that were in fact stolen by her.

At least this much is certain, it cannot be denied that had Licavoli been tried *without* the bribery defendants, the government would *not* have been the beneficiary of the numerous unentitled, devastating inferences that resulted from the "enterprise" theory submitted to the jury over Licavoli's objections. This theory, in our judgment, unavoidably made Licavoli privy to these acts of Bribery despite his having been prevoiusly acquitted of those offenses. This idea becomes even more persuasive in the light of the court's charge which indicated one of the elements the government was required to prove was that "two or more of the persons named as defendants or co-conspirators . . . *conspired* together to violate 18 U.S.C. §1962 (c) by being associated with an enterprise engaged in activities . . . the purpose of which was to control the crime activities in various cities in the Northern District of Ohio by means of *bribery* and other activities." (Tr., 24) (Emphasis supplied).

Given the aforementioned charge, especially when read in the light of other instructions given by the Court, the conclusion is inescapable that the jury may very well have predicated its findings as to the existence of the "enterprise" to some significant degree on the overwhelming proof of bribery involving documents showing Licavoli was being vigorously, and unrelentingly, investigated by the FBI. To the extent that this happened, the conclusion that Licavoli was victimized by the charge itself, the bribery evidence and its relationship to the "enterprise" is inescapable.

Also, in light of its dubious probative value (we contend it lacked any), the Court's admission of evidence showing Licavoli was *the* person whose investigative reports were sought, stolen and "sold" to certain of the alleged coconspirators likewise visited irreparable harm to Licavoli's quest for due process and a fair trial. These flaws also had the pernicious effect of putting Licavoli's char-

acter in evidence in a way that could not even possibly be addressed by the defense.

Our critical assailment also includes the Court's refusal to eliminate from the evidence testimony showing that what those defendants charged with the predicate acts of Bribery (*i.e.*, Liberatore and Ciarcia) had sought from the FBI clerk were *recent* criminal investigative reports concerning James Licavoli. This circumstance related to, and formed the basis for the unavoidable inference that the considerable quantity of materials that were in fact stolen were document accounts of criminal activities involving Licavoli. If not that, we certainly know, that *all* the documents were offered as investigative reports that could be related to Licavoli. This point applies directly to the informer lists, which were, according to the evidence, purposefully sought as an aid to interpreting the various sets of Licavoli documents in which informants were referred to by code numbers.

Predictably the government will surely make the facile argument that any danger of possible misuse by the jury, or any unentitled advantage the government could have otherwise gained at Licavoli's expense, were totally eliminated by the Judge's various charges. For our part, however, the Bribery evidence could only have overwhelmed the judgment of the jury. If not that, it surely made it extremely unlikely they considered Licavoli's guilt or innocence dispassionately and in isolation from such evidence and its pervading impacts—as they should have.

Even this is not all, and this is the real point here, the conclusion is inescapable that the jurors relied on the Bribery evidence in declaring Liberatore and Licavoli were co-conspirators.

III. The Admission of Considerable Evidence Showing the Contents of Various Conversations Had by a Non-Testifying Declarant (a Co-Defendant at

the Trial) With the Witnesses Aratari, Guiles and Lanci, During Which Licavoli Was Credited With Ordering the Murder of Danny Greene, Violated Licavoli's Right of Confrontation and the Hearsay Rule.

We concede that under the co-conspiracy exception to the hearsay rule testimony as to extrajudicial statements may be admitted if it is established, by evidence other than such hearsay, that the accused (here, Licavoli) was involved in a conspiracy with the declarant (in this case Liberatore) and that the statements were made in furtherance of such conspiracy. *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969). Also see Federal Rules of Evidence, Rule 801 (d) (2) (E). This rule, which certainly is not of recent vintage (*Lutwak v. United States*, 344 U.S. 604 [1953]), does not exist as though oblivious to values implicit in the "accused's right to be confronted by the witnesses against him."

The fact that these values must be reckoned with in a meaningful way was made most clear in *California v. Green*, 399 U.S. 149 (1970). Here this court noted that "more than once [it had] found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception" (*Id.*, 155).

At this juncture, we are here concerned with the various statements supposedly made by Liberatore to Aratari and Guiles, concerning Licavoli, some of which were commented on in their presence by Lanci and further embellished. Illustrative of the testimony being referred to and its tenor are the following selected segments of Aratari's testimony dealing with *some* of his asserted conversations with Liberatore:

(1) "He [Licavoli] has two guys on him now, and they need a backup team. Mr. Licavoli wants

it done now, wants Greene's job. . . [done] now and they are taking too much time" (Tr., 3118).

(2) "Mr. Liberatore says if you get Danny Greene you'll have anything in this town you want. My son, you and I will take over this town and Jack White (Licavoli) won't even know about it" (*Ibid.*).

(3) "Well, at that time, Mr. Lanci, Tony Liberatore—I don't know how to explain this—but through the orders of Jack White, this is what he told me—" (Tr., 3157).

(4) "I was already looking for the Irish crew when they sent me up for—Mr. Liberatore . . . they took me off the other case and put me on the Greene case, because . . . he [Liberatore] Mr. Licavoli wants this done right away. It can't wait." (Tr., 3167).

(5) "Mr. Liberatore told me Danny Greene is a pretty strong person in this town. He's got control of the West Side. He's got the gambling. He's got the barbut, the vending machines. He's got the music, the prostitution, dope. And he's even into unions. Jack White [Licavoli] is very upset. Jack White is afraid of him, and Jack White wants him out of the way" (Tr., 3199).

(6) "Liberatore told me the reason they want—Licavoli, Liberatore—want Danny Greene's son out of the way, because if he goes there is going to be a vendetta" (Tr., 3202).

(7) ". . . Mr. White wants him out of the way now" (Tr., 3216).

(8) ". . . [I told Vic that Licavoli is] the number one man, and . . . Liberatore told myself and Vic he was second in command" (Tr., 3217).

(9) "Mr. Liberatore says well we want you off all them people and Mr. White wants you to get on Danny Greene with the other two" (Tr., 3263).

(10) "The same kind of conversation . . . [Took place at a third meeting at the Donut Shop]. Mr. White's getting anxious, you know, can you guys get . . . [Greene]" (Tr., 3275).

(11) ". . . Mr. Liberatore says White is pleased, we're all pleased. Now we got to the other guys, meaning Keith Ritson, O'Donnell, McTaggert and Danny Greene's son" (Tr., 3382).

(12) "Well, that discussion was about everybody on the hill [i.e. Little Italy] was well pleased, especially Mr. White" (Tr., 3385).

All of the above quotes come directly from Aratari's direct examination, and there were others. It should be further understood that some of these supposed conversations took place in the presence of either Lanci or Guiles—or both of them. Thus their testimony as to these various conversations added further weight to the adverse effect of this evidence.

In our judgment, there was simply no evidence from which the Court (Tr., 3108-3109) or the jury could ever conclude that these various statements, supposedly made by Liberatore to Aratari, were made "with the knowledge and on behalf of" Licavoli. See *United States v. Lawson*, 523 F.2d 804, 806 (5th Cir. 1973).

A. Where Evidence Originating With a Non-Testifying Declarant Is Offered Against an Accused, the Prosecution Must Demonstrate Such Evidence Has an Independent "Indicia of Reliability".

Again, the thrust of Licavoli's position is that the jury's consideration of the testimony concerning the con-

versations and remarks being centralized in this argument violated both his right of confrontation and the hearsay rule. As background for these contentions it should be noted, as was stated in the plurality opinion in *Dutton v. Evans*, 400 U.S. 74 (1970), that "the mission of the confrontation clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier of the fact [has] a satisfactory basis for evaluating the truth of the prior statement" (*Id.*, 89).

In our view, the statements attributed by these various witnesses to Liberatore contained the implied assertion that Licavoli was somehow privy to Liberator's activities. The truth of this implication depends not only on whether Liberatore made the statements attributed to him, but on whether the statements (if made) were reliable. This question turns on the answers as to (1) whether there was "a satisfactory basis for evaluation" their truth (*California v. Green*, 399 U.S., at 161); (2) whether cross-examination could have possibly exposed the statements, if made, to be unreliable (*Dutton v. Evans*, 400 U.S., at 89); and (3) whether the statements themselves contained a sufficient "indicia of reliability" (*Ibid.*).

It may very well be, as the testimony of Lanci and Guiles tends to show, that some of these statements *may* very well have been made by Liberatore. But this fact hardly furnishes a satisfactory basis for crediting the underlying truth of the statements themselves. This is so for a number of reasons including the idea that if the conversations did take place, Liberatore, for his own reasons (including a possible desire to camouflage some ulterior motives or to merely add "prestige" to the undertaking in the eyes of Aratari) may have deliberately made it appear that he acted with Licavoli's blessings. *See Park v. Huff*, 493 F.2d 923, 931-932, *reversed on other grounds*, 506 F.2d 849 (5th Cir. 1974).

B. The Admission of Extrajudicial Statements Imputed by Prosecution Witnesses to a Non-Testifying Declarant, Which Statements Were "Crucial" to the Prosecution and "Devastating" to the Defense, Constitutes a Violation of the Right of Confrontation.

As to this point, it is beyond dispute that the same consideration which generates the hearsay rule supports and animates the right of confrontation. Yet, it seems to be all too clear that any apparent similarity of values as between the rule and the right, does not result in the exclusion of all hearsay that may be violative of the confrontation clause, any more than it makes admissible all testimony that qualifies as an acceptable exception to the hearsay rule.

At least this much is clear, Liberatore, the asserted declarant, could not be subjected to cross-examination, which would have at least exposed his demeanor, and possible lack of credibility to the scrutiny of the jury. Hence, the "mission" of the confrontation clause (usually insured by cross-examination) could not be vindicated here. Granted, it is also true that a failure to serve this confrontation value may not be fatal where the hearsay testimony is neither "crucial" to the prosecution, nor "devastating" to the defense. *Dutton v. Evans*, 400 U.S., at 85, 87 (1970). Here, however, it could not be more obvious, the evidence being assailed was both "crucial" and "devastating". Not only this, unlike the statements made in *Dutton*, the statements made here were not spontaneous, but were in the form of an express assertion that in no way carried with it a caution against it being given undue weight (*Id.*, 87-89).

For these reasons the admission of the statements referred to above must be viewed as violations of the confrontation clause.

IV. In a Multiple Defendant RICO Conspiracy Prosecution It Is Improper to Charge the Jury That a Defendant Could Be Found to Have Committed the Charged Predicated Acts of (a) Conspiracy to Murder a Particular Individual and (b) the Murder of This Same Individual, As Well As, the RICO Conspiracy Itself on an Aider and Abettor Theory.

It is axiomatic that to fasten guilt on one accused of being a conspirator it is necessary to prove such person actually participated in the *charged* conspiracy. Also, the law is that a conspiracy to commit a substantive offense and aiding and abetting its commission are separate offenses. If it were otherwise, one simply could not be convicted of both. *See United States v. Tropiano,* 418 F.2d 1069, at 1083 (3d Cir. 1969), citing *Nye and Nisson v. United States,* 336 U.S. 613 (1949).

Therefore, the distinctions between the concept of "aiding and abetting" and that of "conspiracy" are, under the facts here most crucial. Doubtless, it was because the distinctions between the concept of "aiding and abetting" and that of conspiracy can be so very crucial that this court rather specifically admonished that the crime of "conspiracy" is not to be confused with the crime of "aiding and abetting". *Iannelli v. United States,* 420 U.S. 770, 777 n.10 (1975).

So postured, any argument contending that the various aiding and abetting instructions given to the jury were not hopelessly confusing would not only be specious, such an argument would be totally at odds with simple logic. This is especially so if the rule '. . . that one does not become a party to a conspiracy by aiding and abetting it . . .' *Id.*, at 709. See *United States v. Peoni,* 100 F.2d 401, at 402 (2d Cir. 1938); *United States v. Koch,* 113 F.2d 982, at 983 (2d Cir. 1940); *United States v. Ford,* 324 F.2d

950, at 952-953 (7th Cir. 1963) and *United States v. Greer*, 467 F.2d 1064, at 1070-1071 (7th Cir. 1972). These cases support the idea that more is required to become a conspirator than merely being a participant in the object substantive offense.

Given this circumstance, it is of no mean importance to note the court submitted to the jury alternative theories under which Licavoli could be held accountable for the substantive offense involving the death of Danny Greene. Simply put, the jury was told the requisite determination could be made on the basis of proof there was a *conspiracy* to kill Danny Greene and proof of Licavoli's membership in such conspiracy. *And*, they were also told that this determination could be predicated on an *aider and abettor* theory.

It is this distinction that makes our contentions on this issue so critical. For it could very well be that the jury believed that Licavoli *only* "aided and abetted" Ferritto's efforts to kill Danny Greene and that Licavoli was not privy to the conspiracy to kill Danny Greene. *Or*, the jury could have determined that Licavoli had only aided and abetted the conspiracy in the killing under circumstances that did not make him a conspirator. If either of these options actually reflects what was the jury's thinking then it just has to be that the verdict here cannot survive meaningful scrutiny because only one predicate act was shown. And, of course, if the jury convicted Licavoli of the RICO conspiracy itself on the basis of a belief that he somehow merely aided and abetted the murder conspiracy, then the verdict would be as incomprehensible as was the charge that allowed the conviction of Licavoli to happen in the first place.

The analysis made above must be validated if the Court agrees "the cases are clear that one may cause another to commit, 18 U.S.C. §2(b), or aid and abet its commission, 18 U.S.C. §2 (a), without being a conspirator

with the principal offender." *United States v. Krogstad*, 576 F.2d 22, 29 (3d Cir. 1978).

Given the above tenets and the Court's convoluted aiding and abetting instructions, the question that immediately arises (in the first instance) turns on whether the two predicate acts requirement of §1961 (5) can be satisfied by "proof" that Licavoli (1) aided and abetted the murder of Danny Greene. Assuming a negative answer to this question, is it nonetheless true that one can be convicted on a RICO conspiracy charge on the basis of proof he aided and abetted such a conspiracy?

V. A Charge That Exposes an Accused to Being Convicted by Less Than the Unanimous Concurrence of All the Jurors Violates the Sixth Amendment Rights of the Accused As Implemented by Rule 31 (A), Federal Rules of Criminal Procedure.

Under the instructions given by the Court, the jurors could have returned a less than unanimous verdict. This follows inasmuch as some of the jurors, but not all of them, might have only believed that Licavoli was guilty because he had indeed *conspired* to kill Danny Greene and the killing itself occurred in furtherance of such conspiracy. Others, rejecting Ferritto's testimony about the conspiracy, may have believed Licavoli *aided and abetted* the actual killing by the furnishing of alleged information about the Doctor's appointment. Indeed, this particular option was further complicated by the specific license given the jury to find Licavoli "committed the predicate act of conspiracy to murder" if it were determined that he either "planned *or aided* one or more defendants or co-conspirators in planning the commission of the Greene murder" (Emphasis supplied).

First of all, it cannot be overlooked that the point being specifically argued here was compellingly, in our judg-

ment at least, called to the Court's attention in full compliance with Federal Rules of Criminal Procedure, Rule 30.

Our point, at the trial and now, is that the court's unfortunate charge in which the jury was given these alternative theories of guilt exposed Licavoli to the very real danger of being convicted by less than the unanimous concurrence of all the jurors as to any specific theory of conviction.

The lack of unanimity issue here being urged was specifically dealt with rather recently by the Fifth Circuit in *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977). In *Gipson*, the Court aptly concluded that the right of an accused to a unanimous verdict was violated where, ". . . under the [court's] instruction, the jury was permitted to convict . . . even though there may have been significant disagreement among jurors as to what he did." *Id.*, at 458-459. In making this point, the Court termed superficial the argument, which also may be made in the instant case, that "since every juror was still required to find all elements of the charged offense present in order to convict the defendant, there was necessarily unanimous jury agreement as to . . . guilt". *Id.*, at 457.

VI. Where the Evidence in a RICO Conspiracy Prosecution at Best Shows an Accused Committed Only One of the Alleged Predicate Acts, or Offenses, Such Evidence Would Be Legally Insufficient to Support a Finding of Guilt.

The central contention made in this segment of our Petition is that the pattern requirement of two separate predicate acts could not be, and was not, established as against Licavoli for various specific reasons that emerge from the analysis made below. Our starting point is the indictment as against Licavoli, which ultimately charged

as *predicate acts* (1) a conspiracy to kill Danny Greene and (2) the murder of Danny Greene. These charges were based on asserted violations of the Ohio Revised Code, §2923.01 and 2903.01.

A. "Conspiracy to Murder" Cannot Properly Be Regarded As a Predicate Act in a RICO Conspiracy Prosecution.

The position argued below is that the conspiracy to murder offense relied on as a predicate act for the RICO conspiracy charge set forth in this indictment is not covered by 18 U.S.C. §1961 (1) because, under this section only substantive offenses can be shown as predicate acts. Also, the "two separate acts" requirement of §1961 (5), is not shown by proof of acts that are merely "legally distinct" as distinguished from being "factually distinct." This being so, the conspiracy to murder Greene and the murder of Greene must be regarded as having merged; so much so, that even if proved, could only be regarded as one predicate act. See *United States v. Phillips,* 664 F.2d 971 (5th Cir. 1981) and *United States v. Hernandez,* 591 F.2d 1019 (5th Cir. 1979).

The RICO Act originated in the Senate as S. 1623, 91st Cong., 1st Sess. (1969) (the "Criminal Activities Profits Act") and S. 1861, 91st Cong., 1st Sess. (1969) (the "Corrupt Organizations Act of 1969"). S. 1623 provided that persons who derived income from "criminal activity" and applied that income to the acquisition of a business enterprise shall be guilty of a crime. The original bill defined "criminal activity" as follows:

> The term "criminal activity means [as in the present statute] the various categories of offenses and specific statutes were listed . . . and (c) *any conspiracy to* commit any of the *foregoing offenses.* (Emphasis supplied.)

Id., at §2 (1). S. 1861 created criminal sanctions based on "racketeering activity" and "pattern of racketeering activity", with the former defined as follows:

> (1) The term "racketeering activity" means [as in the present statute the various categories of offenses and specific statutes were listed] . . . and (C) *any conspiracy to commit any of the foregoing offenses.* (Emphasis supplied.)

In the final version of the statute, *i.e.*, §1961 (1), subdivision (c) relating to conspiracy was deleted. As we see it, this fact plainly demonstrates Congress' intention not to make conspiracy a separate act of racketeering.

Also, it should be noted as persuasive that while the general conspiracy statute, 18 U.S.C. §371, is not listed, or otherwise described in §1961 (1), as an act of racketeering, conspiracy to violate any of the three subdivisions of 1962 (d) is so listed. Now the government will surely argue that conspiracy to murder is an "act or threat involving murder", conduct proscribed by 1961 (1) (A). This argument, however, should prove unavailing because the early drafts of the legislation, §1623 and 1861, included conspiracies as a separate offense and also used the word "involving". Stated another way, the absence of the word "involving" from §1961 (1) (B) and (C), which comprise the bulk of the listed offenses, cannot be regarded as significant absent some evidence Congress actually intended conspiracy to commit only those crimes listed in (A) and (D) should be regarded as predicate offenses and did not intend conspiracy to commit a welter of other offenses listed under (B) and (C), should be predicate offenses.

The closest case to the present issue—whether conspiracy to murder can be regarded as a predicate act in a RICO prosecution—is *United States v. Welch*, 656 F.2d 1039 (5th Cir. 1981). In *Welch*, the Court had before it the precise question here—that is, whether "conspiracy to

murder" can properly be regarded as a predicate act in a RICO prosecution. What is significant is that the Court in *Welch*, after resolving the appeal on a different basis, made the point that "it is not yet settled whether a charge of conspiracy to murder is a proper predicate for a RICO charge" *Id.*, at 1063 n.32.

In any event, whether conspiracy to murder (a charge based on the Ohio statute referred to above) could, under the facts of this case, be a predicate act was a most critical issue submitted to the courts below. Despite this fact, the Sixth Circuit's conclusory reasoning is exposed upon analysis to not only be defective but to have missed the point. Here the Court, in holding a conspiracy to murder could be a RICO predicate offense (*Licavoli*, at 1045, Appendix "B", at A7) failed to recognize the variance between its rationale and that expressed by the second circuit in *United States v. Weisman*, 624 F.2d 1118 (2d Cir. 1980), a case upon which it placed primary reliance. Also see *United States v. Bagaric*, 706 F.2d 42 (2d Cir. 1983). In *Bagaric*, the Second Circuit credited *Weisman* with having articulated the idea that to be a predicate act to support a substantive RICO charge the "proof must be of consummated acts of Racketeering and not conspiracies or attempts, unless conspiracies or attempts to commit the substantive crimes are included within §1961 (1) (D)." *Bargaric*, at 62 n.17.

Also, it should be noted, the District Court correctly reasoned that the legislative history of the RICO statute provided the proper test for determining whether a State offense could be regarded as a predicate act. Simply put, according to that history "State offenses are included by generic designation," 1970 *U.S. Code Cong. and Ad. News*, 4032. This being so, it becomes understandable why the Sixth Circuit deliberately failed to mention the "generic designation" required by the legislative history in its analysis.

What makes the idea that the Sixth Circuit's omission of any reference to the test required by RICO's legislative history must have been deliberate so compelling is because under the "generic designation" test it is at once apparent that "a conspiracy offense is not the same as a murder offense. And, one who conspires to murder has not committed the murder itself." Tarlow, Vol. VIII, *The Champion* 57, at 58 (March 84).

Indeed, in specifically commenting on this flawed aspect of the Sixth Circuit's opinion, a leading authority in the area of RICO prosecutions made the following point:

> Oddly, Judge Kennedy acknowledged this principle in the context of her holding that murder and conspiracy to murder are separate offenses under Ohio law and may both be RICO predicate offenses. *United States v. Licavoli* [citation omitted]. This holding could not have been reconciled with the earlier holding on conspiracies as state law predicate offenses had the generic designation test been applied as required by the RICO legislative history. (*Ibid.*)

Hopefully then, this court will view the resolution of this issue in the courts below as one that ought to be fully investigated by this court.

B. Where the State Law Mandates Upon Conviction a Merger of the Conspiracy to Murder Charge With the Substantive Murder Offense, the Government Does Not, by Proving Both the Conspiracy to Murder and the Murder Itself, Establish Two Predicate Acts Sufficient to Satisfy the Requirements of 18 U.S.C. §1962 (d).

A fair reading of Ohio's conspiracy statute, particularly Ohio Revised Code, §2923.01 (G), shows that any conspiracy offense, including conspiracy to murder, Ohio Revised Code §2923.01 (A) (1) and (2), must be re-

garded as an inchoate offense that merges into the particular substantive, or principal, offense involved when one is *convicted* of such offense. Also, Ohio Revised Code, §2923.01 (F), declares that one "who conspires to commit more than one offense is guilty of only one conspiracy when such offenses are the object of the same agreement or continuous conspiratorial relationship."

As applied here, this statute mandated the conclusion actually reached by the trial Judge that any conspiracy, here, to kill *Greene and Nardi* simply could not be fragmented into two (2) predicate acts by the government in its quest for a RICO conspiracy conviction. The trial court in dealing with this particular aspect of our contentions actually agreed (Appendix C, at A38).

While the Court was certainly correct in the above holding, there were other serious flaws in the Court's overall rationale. These include several that were recognized in Barry Tarlow's analysis of the decision below in Vol. VI. No. 7, *The Champion* (August, 1982) pp. 3 and 10. Here it was reasoned that "the refusal to apply §2923.01 (G) is arguably inconsistent with the Court's . . . holding that Ohio Law governs the merging of the two murder conspiracies into a single murder conspiracy." *Id.*, at 10. This was said to be so because, as Tarlow saw it, the state statute concerning multiple conspiracies, §2923.01 (F), "was part of the same statute relating to the merger of substantive and conspiracy offenses". *Ibid.*

Our argument that the trial court's merger argument misses the mark is strengthened by the analysis given the merger concept in *United States v. Phillips*, 664 F.2d 971, 1038-1039 (5th Cir. 1981). In *Phillips*, the court discussed the post-verdict acquittal granted one of the defendants, Echezarreta, and found that there was a merger of the only offenses involved as against Echezarreta. In arriving at this conclusion, the *Phillips* court, which was dealing

with the charges of possession with intent to distribute and the actual distribution of marijuana, reasoned that inasmuch as "possession with intent to distribute and actual distribution merged into one, there was no separate crime performed in furtherance of the conspiracy's objective that would constitute the necessary second act of racketeering" *Id.*, at 1039. The Court's authority for this position was said to be that Circuit's decision in *United States v. Hernandez*, 591 F.2d 1015 (5th Cir. 1979) (*en banc*). There the Court had held, in language that truly applies to the present case, that "[w]hen the intent to distribute was executed by a successful sale, the possession with intent to do so merged into the completed offense." 591 F.2d, at 1022.

C. The Requirement Under 18 U.S.C. 1961 (1) (A) That a State Offense Must Be "Chargeable and Punishable by Imprisonment for More That One Year" to Qualify As a Predicate Act Means Chargeable and Punishable at the Time of the Indictment, and It Means Separately Punishable From Any Other Related or Interrelated Offense.

Although the Courts may have properly rejected our argument that Licavoli's acquittal was a bar to any further effort by the government to relitigate the issue as to his asserted involvment in the murder of Danny Greene, their dual sovereignty analysis simply does not conclusively resolve the issues as to the extent "predicate acts" in a RICO prosecution can be based on state offenses for which there has been acquittal. See, *e.g.*, *Licavoli*, 725 F.2d, at 1047; Appendix B, at A17.

Here it should be noted §1961 (1) (A) requires that state offenses, if they are to serve as predicate acts, must be "chargeable under state law and punishable by imprisonment for more than one year." Indeed it has been

specifically noted, although in dissent, that after an acquittal in state court, the offense involved is neither "chargeable" nor "punishable" by more than one year imprisonment. *United States v. Frumento,* 563 F.2d 1083, 1097 (3d Cir. 1977) (*cert. denied,* 434 U.S. 1072 [1978]). Also see *United States v. Davis,* 576 F.2d 1065, 1068-1071 (3d Cir. 1978) (concurring opinion). Significant too is the fact that the majority in *Frumento* reasoned the role of state offenses in a RICO prosecution was merely "definitional" and served only to identify the proscribed unlawful conduct. *Id.,* at 1087 n.8A. The Courts below have fully adopted this thesis (See Appendix B, at A11.) In reaching this (farfetched in our judgment) conclusion the majority in *Frumento* specifically rejected the position here being taken, although its logic seems irresistible.

This argument relies, as we do, on *United States v. Mason,* 213 U.S. 115 (1909), for the proposition that an acquittal in state court must be deemed controlling where the subsequent federal prosecution is based on a state statutory offense. This rule is predicated on the idea that a state court's interpretation of state law is always binding on Federal Courts. Indeed, the law on this point is so clear it caused this Court to recognize it lacks the power to correct a state court's construction of state law. *Herb v. Pitcairn,* 324 U.S. 117, 125-126 (1945). Also *see Huntington v. Attrill,* 146 U.S. 657, 669-673 (1892) for the proposition that "crimes and offenses against the laws of any state can only be defined, prosecuted and pardoned by the sovereign authority of that state".

This brings us to the critical holding in *United States v. Mason, supra.* There the Court, in clear and unambiguous language, proclaimed that:

> As a general rule, the Federal courts accept the judgment of the state court as to the meaning and scope of a state enactment, whether civil or criminal. Much

> more should the Federal court, it becomes material to inquire whether that particular crime against the State was committed by the defendants on trial in Federal court for an offense against the United States. 213 U.S., at 125.

It follows from *Mason* that the Courts below were obligated to defer to the State Court verdicts in favor of Licavoli.

CONCLUSION

Judge Merritt, in his concurring opinion below, perhaps said it best when he noted that:

> It may seem strange for a federal court to uphold convictions under a federal statute based on two underlying predicate state offenses for which a defendant has either been acquitted at state trials (the murder of Danny Greene) or for which he could not be separately convicted or punished under state law (conspiracy to murder Danny Greene).

While it may indeed seem only strange to Judge Merritt, for our part strange is really not a strong enough word. For if Licavoli could be properly convicted on the basis of the facts here then truly the Government can require any one of us to either run a gauntlet or subject themselves to trial by ordeal.

With all the considerations involved in this case in mind surely this court can see its way to reviewing this conviction.

Respectfully submitted,

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83-1657

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES T. LICAVOLI
Petitioner

V.

UNITED STATES OF AMERICA
Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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APPENDIX A

Supreme Court of the United States

NO. A-700

JAMES T. LICAVOLI
Petitioner

V.

UNITED STATES OF AMERICA
Respondent

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 8, 1984.

Sandra D. O'Connor
Associate Justice of the Supreme Court of the United States

Dated this 6th day
of March, 1984.

APPENDIX B

Nos. 82-3498, 3509, 3510, 3511, 3512, 3513, and 3606

United States Court of Appeals
for the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JAMES T. LICAVOLI (82-3498),
ANTHONY LIBERATORE (82-3509, 82-3606),
JOHN P. CALANDRA (82-3510),
PASQUALE CISTERNINO (82-3511),
RONALD CARABBIA (82-3512),
KENNETH CIARCIA (82-3513),
Defendants-Appellants.

APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed January 9, 1984

Before: MERRITT and KENNEDY, Circuit Judges, and PRATT, District Judge.*

KENNEDY, Circuit Judge, delivered the opinion of the Court, in which PRATT, District Judge concurred. MERRITT, Circuit Judge, (pp. 23-24) filed a separate concurring opinion.

KENNEDY, Circuit Judge. The six defendant-appellants were convicted of conspiring to participate in the affairs of an enter-

* Honorable Philip Pratt, United States District Court for the Eastern District of Michigan, sitting by designation.

prise through a pattern of racketeering activities in violation of the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1962(c) and (d)[1] following a jury trial, and now appeal those convictions. Defendant Liberatore also appeals a denial of his motion for a new trial on a bribery conviction. All seven appeals have been consolidated. We affirm the judgments of conviction of all defendants.

In order to sustain a prosecution under RICO the government must establish that defendants engaged in a "pattern of racketeering activity," defined as at least two acts of racketeering activity. 18 U.S.C. § 1961(5). "Racketeering activity" is defined in 18 U.S.C. § 1961(1). The facts elicited by the prosecution at trial to prove the defendants' pattern of racketeering activity are lengthy and complex. Briefly, the government asserts (and we agree) that the evidence, viewed in the light most favorable to it, established the following.

I. Facts

Defendant Licavoli is a leader of organized crime in Cleveland. Liberatore is his second-in-command, and Calandra also holds a position of confidence and responsibility within the organization. Carabbia and Cisternino act for the organization, carrying out the orders of the top men. Ciarcia manages a car dealership and supplies vehicles for the organization's criminal activities and also acts on behalf of the organization in other ways.

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[1] Those sections provide as follows:

> (c) It shall be unlawful for any person to be employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
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> (d) It shall be unlawful for any person to violate any of the provisions of subsections (a), (b), or (c) of this section.

In the spring of 1976 Licavoli decided that he needed to have one Danny Greene killed. Greene was the leader of a rival criminal organization which had developed a monopoly on criminal activity in West Cleveland. Licavoli had others in his organization contact Raymond Ferritto regarding his wish to have Greene killed.[2] Ferritto testified that he met at various times with each of the defendants (except Liberatore), sometimes separately, sometimes in groups, to plan Greene's murder. Ferritto stalked Greene for some months without success, sometimes assisted by Cisternino. After Ferritto had been on the job for some time he asked Licavoli for money to cover his expenses, and he was eventually given $5,000 by Carabbia. Licavoli also told Ferritto that he would get a percentage of money derived from gambling in the Warren and Youngstown areas when the murder was accomplished.

Ferritto and Cisternino attempted to bomb Greene's apartment building in order to kill him, but never carried through because of the regular presence of older people in the area. On another occasion they drove to a party attended by Greene intending to kill him. They located Greene's car but found that it was guarded by members of Greene's criminal organization seated in an adjacent car.

Meanwhile Liberatore arranged with two other men, Aratari[3] and Guiles, to kill others in Greene's criminal organization, and ultimately to help kill Greene as well. Aratari and Guiles were at times assisted in their efforts by defendants Carabbia, Calandra, Cisternino and Ciarcia. Ciarcia and another man provided Aratari and Guiles with a car and weapons.

Licavoli had Greene's phone tapped in an effort to obtain reliable information regarding Greene's daily activities. Carab-

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[2] Ferritto later testified against all six defendants in their state trials for Greene's murder.

[3] Aratari testified at the trial in this case.

bia and Cisternino gave Ferritto the resulting tapes. One tape revealed that Greene was to go to a dentist's appointment at 2:30 p.m. on Thursday, October 6, 1977. Defendants Licavoli, Cisternino and Carabbia played this tape for Ferritto on Monday, October 3.

On Thursday, the day of Greene's dentist appointment, Cisternino and Ferritto built a bomb in an apartment maintained by Cisternino. Ferritto drove to the vicinity of the dentist's office with the bomb in his car, a Plymouth. Carabbia drove a second car to the office, a Nova. This car had a special box mounted on the side in which the bomb was to be placed. Cisternino remained behind at the apartment to listen to a police scanner for calls. A few minutes after Ferritto and Carabbia arrived at the dentist's, Aratari and Guiles arrived in another car, supplied by Ciarcia as the car to be used in "the Danny Greene case." Guiles was armed with a high powered rifle. The plan was for Guiles to shoot Greene if he had the opportunity. The bomb was to be used as a backup method.

Greene arrived for his appointment, parked his car and entered the office. Guiles apparently had no opportunity to shoot. A few minutes later a parking space opened next to Greene's car. Ferritto placed the bomb in the box on the side of the Nova, parked the Nova next to Greene's car, and activated the bomb. Then he got into the driver's seat of the Plymouth, which was parked down the block. When Greene emerged from the office Ferritto began to drive away, with Carabbia in the back seat. Carabbia then detonated the bomb with a remote control device and Danny Greene was killed.

All six defendants in the present case were tried for Danny Greene's murder in state court. Cisternino, Carabbia and Ciarcia were convicted of Greene's murder.

The RICO prosecution now on appeal also relied on a separate set of events to establish a predicate criminal act.

Ms. Geraldine Rabinowitz[4] worked as a file clerk in the Cleveland office of the FBI, while her then-fiance Jeffrey Rabinowitz worked at the car dealership that Ciarcia managed. In the spring of 1977 Ciarcia asked Ms. Rabinowitz to obtain confidential information from the FBI regarding investigations of himself, Liberatore, and Licavoli. Ms. Rabinowitz complied, after some hesitation, and continued to steal confidential information for Ciarcia from time to time throughout the summer of 1977. Ciarcia assured Ms. Rabinowitz that she would in return be "covered" for a downpayment on a new home that she and her fiance planned to buy. On October 12, 1977 the Rabinowitzes met with Liberatore and Ciarcia, and the Rabinowitzes asked for $15,000 for a down payment on the home. Although Liberatore was at first unwilling to comply with this request, the next day he delivered a paper bag to Ms. Rabinowitz containing $15,000 in cash. Counsel for Liberatore characterized this payment as a "loan", but no interest was set, no repayment schedule made, and no collateral specified. The stolen FBI documents were later found at Ciarcia's car dealership. All six defendants were charged with two counts of bribery and one count of conspiracy to commit bribery and were tried in federal court. Ciarcia pleaded guilty to all three counts, and Liberatore was convicted of the conspiracy count and one substantive count.

All six defendants were tried together in federal court for the RICO violation. The jury found all six guilty of having violated RICO. Defendants now raise a large number of issues on appeal.

II. Conspiracy to Murder May Be a Predicate Act for a RICO Conviction

The District Court instructed the jury that there were three possible acts which the jury could find to serve as

[4] Ms. Rabinowitz testified at the federal bribery trial and the trial in this case.

predicate acts of racketeering for the RICO charge. These were: 1) conspiracy to murder Danny Greene; 2) the murder of Danny Greene; and 3) bribery. The court instructed that the bribery act applied only to defendants Liberatore and Ciarcia. The jury therefore had to find that the other four defendants both conspired to murder, and murdered Danny Greene in order to convict them of the RICO violation. These four defendants (Licavoli, Calandra, Carabbia, Cisternino) now argue that conspiracy to commit murder cannot serve as a predicate act for a RICO conviction, and that their RICO convictions therefore cannot stand.

Under 18 U.S.C. § 1961(1)(A) racketeering activity includes "any act or threat involving murder. . . ." Conspiracy to murder on its face fits within this definition of racketeering activity. Conspiracy is "an act . . . involving murder." However the original versions of the bill that ultimately became RICO specifically included conspiracy as a predicate act under section 1961, while the final bill did not. Defendants argue that Congress' failure specifically to enumerate conspiracy in the final version of the bill demonstrates a legislative intent not to allow conspiracy as a predicate act.

The Second Circuit rejected this argument with respect to conspiracies to commit acts listed in the definition of racketeering activity under section 1961(1)(D) in *United States* v. *Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980). *See also United States* v. *Brooklier*, 685 F. 2d 1208, 1216 (9th Cir. 1982) (conspiracy to extort may be a predicate act), *cert. denied*, ____ U.S. ____, 103 S. Ct. 1194 (1983); *United States* v. *Phillips*, 664 F.2d 971, 1015 (5th Cir. 1981) (conspiracy to import marijuana may be a predicate act), *cert. denied*, 455 U.S. 912 (1982).

Under 18 U.S.C. § 1961(1)(D), racketeering activity includes:

> [A]ny offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the

> felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

The Second Circuit in *Weisman* based its holding on the expansive language in (D), "any offense involving" the enumerated substantive crimes, "punishable under any law of the United States."[5] The court noted:

> This conclusion is bolstered by the fact that subsections (B) and (C) [of § 1961(1)], which list most of the other predicate acts chargeable under RICO, conspicuously lack the broad "any offense involving" language of subsection (D) and, in fact, require that the act be indictable under specifically enumerated sections of the criminal code.[6]

624 F.2d at 1124.

Subsection (A) of 18 U.S.C. § 1961(1) contains language similarly expansive to that in subsection (D). Under (A), racketeering activity includes "any act or threat involving" the substantive crime, "chargeable under state law and punishable by imprisonment for more than one year." The "provisions of . . . [RICO] should be liberally construed to effectuate its remedial purposes."[7] Organized Crime Control Act of

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[5] This language also appeared in the original drafts of the bill that became RICO.

[6] *Cf. Brooklier*, *supra*, which holds that

> [c]onspiracies or attempts can serve as the underlying racketeering activities because 18 U.S.C. § 1961(1)(B) defines "racketeering activity" as including those offenses indictable under 18 U.S.C. § 1951. Section 1951, in turn, makes punishable attempts or conspiracies to obstruct, delay, or affect commerce by robbery, extortion or physical violence.

685 F.2d at 1216.

[7] Courts have construed the provisions of RICO liberally in applying its criminal remedies. *See* Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett* v. *Berg*, 58 Notre Dame L. Rev. 237, 245 n. 25 (1982), and cases cited therein.

1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947. We see no indication that Congress intended conspiracy to commit murder not to be a predicate act under section 1961(1)(A) along with conspiracy to extort, to commit securities fraud or to import drugs under section 1961(1)(D). The Fifth Circuit took the position that conspiracy to commit murder may be a predicate act in *United States* v. *Welch*, 656 F.2d 1039, 1063 n.32 (5th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982), saying,

> There is merit to the argument that subsection A [of 18 U.S.C. § 1961(1)] is as broad and inclusive as the language of subsection D. If conspiracy to commit a section D offense can serve as a predicate act for a RICO charge, then conspiracy to commit a subsection A offense should also be able to serve as a predicate act. The language of subsection A itself – which includes "any act or threat involving murder" – appears to contemplate a conspiracy to commit murder. A conspiracy to commit murder is an act *involving* murder. (emphasis in original)

We adopt the Fifth Circuit's reasoning in *Welch* and hold that conspiracy to commit murder may be a predicate act under 18 U.S.C. § 1961(1)(A) for a RICO charge.

III. Murder and Conspiracy to Murder Are Separate Offenses under Ohio Law and May Both Be Predicate Acts under RICO

For a defendant to be convicted under RICO he must have committed more than one act of racketeering activity. In order for a state crime, such as murder or conspiracy to murder to serve as a predicate act, it must be "chargeable under state law and punishable by imprisonment for more than one year" under 18 U.S.C. § 1961(1)(A). Federal law holds that conspiracy to commit a substantive offense and the substantive offense itself are two separate crimes. *See, e.g., Iannelli* v. *United States*, 420 U.S. 770, 777 (1975). Under Ohio law, conspiracy to murder and murder are also two separate crimes.

However, a person convicted of the substantive crime "shall not be convicted of conspiracy involving the same offense." Ohio Rev. Code § 2923.01(G). Thus under Ohio law a person cannot be convicted of or sentenced for both conspiracy to commit murder and the murder crime itself. Defendants argue that the two acts consequently are not both "chargeable under state law and punishable for more than one year."

We disagree, for two reasons. First Ohio law, in both the Ohio Revised Code and the earlier case law, provides that conspiracy to commit a substantive act and the substantive act are separate offenses, both separately chargeable under state law. In *State* v. *Lucas*, 85 N.E. 2d 154, 156 (Ohio Ct. C.P. 1949), the court stated:

> The conspiracy to commit a crime is an entirely different offense from the crime that is the object of the conspiracy. It is not a substantive offense, but essentially a crime of intent. It does not merge in the completed offense. The unlawful combination and confederacy constitute the essential element of criminal conspiracy rather than the overt acts done in pursuance thereof, and neither the success nor failure of criminal conspiracies is determinative of the guilt or innocence of the conspirators.

Lucas predates the current Ohio statutory provision, Ohio Rev. Code § 2923.01.[8] The statute in *Lucas* made it a crime

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[8] The statute provides, in part:

(A) No person, with purpose to commit or to promote or facilitate the commission of aggravated murder or murder, kidnapping, compelling prostitution or promoting prostitution, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or a felony offense of unauthorized use of a vehicle, corrupting another with drugs, theft of drugs, or illegal processing of drug documents shall do either of the following:

(1) With another person or persons, plan or aid in planning the commission of any such offense;

(2) Agree with another person or persons that one or more of them will engage in conduct which facilitates the commisssion of any such offense.

to conspire to defraud. Under this statute, unlike the current one, a defendant could be convicted and sentenced separately for the substantive crime and conspiracy to commit the substantive crime. *Lucas* is significant here, however, for its articulation of the common law of Ohio that the conspiracy and the substantive crime are "entirely different."

The Ohio Revised Code has not modified this common law precept. Murder is a crime, chargeable under Ohio law, Ohio Rev. Code § 2903.02, and punishable by imprisonment for more than one year, § 2929.02. Conspiracy is also a crime in Ohio, Ohio Rev. Code § 2923.01(A), and is punishable by imprisonment for more than one year, § 2929.11. RICO nowhere indicates that two criminal acts otherwise qualifying as predicate acts may not both constitute predicate acts because under state law a defendant could not be convicted of or sentenced for both crimes.

Secondly, contrary to defendants' contention, it is irrelevant whether these particular defendants could have been charged under Ohio law and imprisoned for more than one year for both conspiracy to murder and murder. This argument has been raised and rejected several times in the context of state statutes of limitations, when the state statute has run on a state crime which is offered as a predicate act for a RICO violation. Courts have held that regardless of the running of the state statute the defendant is still "chargeable" with the state offense within the meaning of 18 U.S.C. § 1961 (1)(A). *United States* v. *Malatesta*, 583 F.2d 748, 758 (5th Cir. 1978), *cert. denied*, 440 U.S. 962 (1979); *United States* v. *Davis*, 576 F.2d 1065, 1066-67 (3d Cir.), *cert. denied*, 439 U.S. 836 (1978); *United States* v. *Forsythe*, 560 F.2d 1127, 1134 (3d Cir. 1977). The reference to state law in the statute is simply to define the wrongful conduct, and is not meant to incorporate state procedural law. *United States* v. *Brown*, 555 F.2d 407, 418 n.22 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). The Third Circuit noted in *United States*

v. *Frumento*, 563 F.2d 1083, 1087 n.8A (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978):

> Section 1961 requires, in our view, only that the *conduct* on which the federal charge is based be typical of the serious crime dealt with by the state statute, not that the particular defendant be "chargeable under State law" at the time of the federal indictment. (emphasis in original)

We agree and hold that conspiracy to murder and murder may both constitute predicate acts in this case, regardless of the fact that a defendant cannot under Ohio law be separately punished for having committed both crimes. Ohio law does define the two acts as separate crimes, each punishable by imprisonment for more than one year, and this is all that is required under 18 U.S.C. § 1961(1)(A).

IV. Acquittal in State Court of Criminal Acts Does Not Bar Their Use as Predicate Acts for a RICO Conviction

Defendants Licavoli and Calandra were acquitted in state court proceedings of murdering Greene and conspiring to murder Greene. Consequently, they argue, they were not "chargeable" with the murder or conspiracy to commit murder, as required under 18 U.S.C. § 1961(1)(A), and murder and conspiracy to commit murder could not therefore serve as predicate acts for their RICO convictions.

We disagree. *Frumento* is directly on point. Defendants in that case were acquitted in state court on charges of bribery, extortion and conspiracy to accept bribes. They were then convicted in federal court of violating 18 U.S.C. § 1962(c) and (d), with the above crimes as predicate acts. On appeal defendants argued that the conviction was barred by the double jeopardy clause of the fifth amendment. The Third Circuit disagreed. The court said,

> [RICO] forbids "racketeering," not state offenses per se. The state offenses referred to in the federal act are definitional only; racketeering, the federal crime, is defined as a matter of legislative draftsmanship by a reference to state law crimes. This is not to say . . . that the federal statute punishes the same conduct as that reached by state law. The gravamen of section 1962 is a violation of federal law and "reference to state law is necessary only to identify the type of unlawful activity in which the defendant intended to engage." *United States* v. *Cerone*, 452 F.2d 274, 286 (7th Cir. 1971). (Footnote omitted.)

563 F.2d at 1087. *See also United States* v. *Phillips*, 664 F.2d 971, 1015, (5th Cir. 1981), *cert. denied*, 455 U.S. 912 (1982); *United States* v. *Anderson*, 626 F.2d 1358, 1367 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

V. The Prior Testimony of Raymond Ferritto Was Properly Admitted at Trial

Ferritto had testified at the state murder trials[9] of the six defendants. He refused to testify at the federal RICO trial, however, claiming that the government had breached its plea agreement with him, and consequently he had to serve more time than he had been promised. Also, he asked for immunity from prosecution for perjury as a condition of his testifying. The government granted him use immunity, that is immunity from the use of his testimony in the RICO case to prove that his prior testimony was perjurious, but granted him no immunity for any perjury he might commit in the RICO trial itself. Ferritto still refused to testify and the court held him in contempt.

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[9] There were three separate trials in state court: 1) the trial of Licavoli, Cisternino, and Carabbia; 2) the trial of Calandra, Ciarcia and Lanci (not a defendant in this action); and 3) Liberatore's trial. The charges in all three trials were conspiracy to murder Danny Greene, and Greene's murder.

The court then granted the government's motion to read Ferritto's testimony from the three state trials into the record, finding that Ferritto was "unavailable" within the meaning of Fed. Rule Evid. 804(a). The court instructed the jury that Ferritto's testimony in the state trial of Licavoli, Cisternino and Carabbia was admissible only against those three defendants; Ferritto's testimony from the trial of Calandra and Ciarcia was admissible only as to those two, and Ferritto's testimony in Liberatore's trial was admissible only against Liberatore. Ferritto's testimony in the first two trials was substantially the same. Upon the request of Liberatore's attorney the prosecution did not read Ferritto's full testimony from Liberatore's trial, but only the few lines that related specifically to Liberatore.

Defendants make several arguments regarding Ferritto's testimony. First they claim that the government was responsible for Ferritto's failure to testify. He was therefore not "unavailable" under Fed. Rule Evid. 804(a), and his testimony was inadmissible. Rule 804(a) states, in part, "[a] declarant is not unavailable as a witness if his . . . absence is due to the procurement or wrongdoing of the proponent of his statement *for the purpose of preventing the witness from attending or testifying*" (emphasis added). The law is clear that Ferritto's prior testimony, if otherwise admissible, was not made inadmissible by the government's actions unless the government actually sought to prevent the witness from testifying. *Steele* v. *Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1501 (1983); *United States* v. *Seijo*, 595 F.2d 116, 119-20 (2d Cir. 1979). This was hardly the case. Ferritto was the government's star witness. The government even offered him immunity from possible perjury prosecution to induce him to testify. There is no suggestion in the record that the government breached its plea agreement *in order* to prevent Ferritto from testifying at the RICO trial.

Defendants further argue that Ferritto's testimony should not have been admitted because 1) defendants did not have an adequate motive and opportunity to cross-examine Ferritto in the state proceedings, and 2) admission of the prior testimony violated the confrontation clause of the sixth amendment.

Federal Rule of Evidence 804(b)(1) allows admission of prior testimony if the issues in both cases are sufficiently similar so as to give the party against whom the testimony is offered "an opportunity and similar motive to develop the testimony." Here the issues in the cases were nearly identical, since in the state cases the defendants were charged with murder and conspiracy to commit murder, and in the RICO prosecution these two acts constituted the predicate acts for the RICO conviction. Defendants argue that because of the additional "enterprise" element that must be shown in a RICO prosecution their motive to cross-examine was not the same here as in the state prosecutions. However, defendants have failed to point to any matter that they would have raised in cross-examination with respect to the enterprise element that they did not raise in the prior proceedings.

Each defendant certainly had adequate motive to cross-examine Ferritto with respect to testimony given in his own trial. The jury was carefully instructed to consider against each defendant only the testimony that Ferritto had given at the defendant's own trial. We agree with defendants that it may be humanly impossible for a juror completely to compartmentalize multiple versions of an event and apply each version only against a certain defendant. However, this is not to say that evidence implicating more than one defendant in a joint prosecution may never be admitted with an instruction that it applies only to a single defendant. In this case the testimony in the state trials was substantially the same, so it is hard to see how any of the defendants was prejudiced by admission of more than one version of the events. To the extent that there are discrepancies in Ferritto's testimony the jury was made

aware of these by virtue of having heard the different versions. The jury heard both Ferritto's direct testimony and cross-examinations. We cannot say that Ferritto's testimony was improperly admitted.

The above analysis applies as well with respect to defendants' confrontation clause argument. The Supreme Court long ago held that admitting testimony of an unavailable witness does not violate the confrontation clause. *Mattox* v. *United States*, 156 U.S. 237, 242-44 (1895). The confrontation clause requires that a hearsay declarant be unavailable, and that his statements bear some "indicia of reliability." *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980); *Mancussi* v. *Stubbs*, 408 U.S. 204, 213 (1974); *California* v. *Green*, 399 U.S. 149, 161 (1970); *Pointer* v. *Texas*, 380 U.S. 400, 407 (1965). We have concluded that Ferritto was unavailable. Ferritto has been cross-examined at length by one or more of the defendants on all of the testimony that was read to the jury and those cross-examinations were also read to the jury. All of the defendants have cross-examined Ferritto about the same set of facts. The defendants' motives for cross-examination at the state trials and the RICO trial were substantially identical. We find that the indicia of reliability necessary to satisfy the confrontation clause are present here and hold that Ferritto's testimony in the state prosecutions was properly admitted.

Defendants also claim that they were prejudiced by the fact that the District Court had Ferritto's testimony re-read to the jury, upon the jury's request, during jury deliberations. It is within the judge's discretion to re-read testimony for a deliberating jury. Indeed, the cases in this area generally challenge the judge's decision *not* to have the testimony re-read to the jury. *See, e.g., United States* v. *Toney*, 440 F.2d 590, 591-92 (6th Cir. 1971); *United States* v. *Almonte*, 594 F.2d 261, 265 (1st Cir. 1979). The transcripts of Ferritto's testimony are lengthy and comprised a large portion of the state's case, and it is understandable that the jury felt a need to hear

them a second time during deliberation. Defendants have failed to show that the District Court abused its discretion in allowing the transcripts to be read a second time.

VI. There was Sufficient Evidence for the Jury to Convict the Defendants

Defendant Carabbia argues that there was insufficient evidence to show that defendants agreed to participate in the affairs of the enterprise. We find this claim to be wholly without merit, as the summary of facts recited above – taken from testimony introduced at trial – demonstrates.

Defendant Liberatore argues that there was insufficient evidence to establish that he and Ciarcia bribed Ms. Rabinowitz to provide them with confidential FBI information and documents. This Court dealt fully with this question and resolved it against Liberatore in *United States* v. *Lanci and Liberatore*, 669 F.2d 391, 393 (6th Cir.), *cert. denied*, 457 U.S. 1134 (1982), and we will not consider it further here.

VII. Principles of Double Jeopardy Did Not Bar the Government from Using Bribery as a Predicate Offense for the RICO Convictions

Defendants Liberatore and Ciarcia were convicted in federal court of bribing Ms. Rabinowitz. This bribery offense was also used as a predicate act for the RICO convictions of these two defendants. Liberatore and Ciarcia now claim that use of the bribery offense in the RICO prosecution violated the double jeopardy clause of the fifth amendment.

The Supreme Court articulated the analysis to be applied to statutory schemes in order to evaluate them for double jeopardy purposes in *Whalen* v. *United States*, 445 U.S. 684 (1980). First, courts should apply the "*Blockburger* test" articulated in *Blockburger* v. *United States*, 284 U.S. 299 (1932), in order to determine whether the same act constitutes a violation of two distinct statutory provisions. To see whether

there are two offenses or only one the court must determine whether *each* provision requires proof of a fact which the other does not. When the offenses are the same under the *Blockburger* test, *Whalen* holds that "cumulative sentences are not permitted, unless elsewhere specifically authorized by Congress." 445 U.S. at 692.

Even if the predicate act of bribery and the RICO charge fail the *Blockburger* test, which we do not decide,[10] Congress did specifically authorize cumulative sentences under RICO. *United States* v. *Hartley*, 678 F.2d 961 (11th Cir. 1982); *United States* v. *Anderson*, 626 F.2d 1358, 1367 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *United States* v. *Aleman*, 609 F.2d 298, 306 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *United States* v. *Rone*, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). As the *Rone* court noted:

> There is nothing in the RICO statutory scheme which would suggest that Congress intended to preclude separate convictions or consecutive sentences for a RICO offense and the underlying or predicate crimes which make up the racketeering pattern. The racketeering statutes were designed primarily as an additional tool for the prevention of racketeering activity, which consists in part of the commission of a number of other crimes. The Government is not required to make an election between seeking a conviction under RICO, or prosecuting the predicate offenses only. Such a requirement would nullify the intent and effect of the RICO prohibitions.

598 F.2d at 571.

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[10] *Cf. United States* v. *Anderson*, 626 F.2d 1358, 1367 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981), in which the court concluded that the enterprise element of the RICO offense constitutes an element of the crime not required for the predicate criminal acts.

This Court has ruled on a closely related question in *United States* v. *Morelli*, 643 F.2d 402 (6th Cir.), *cert. denied*, 453 U.S. 912 (1981). Morelli was convicted of two counts of wire fraud, and these acts were used as predicate offenses for a RICO conviction. Morelli complained that he was subject to cruel and unusual punishment in violation of the eighth amendment because he was sentenced to fifteen years for the RICO violation, in addition to ten years for the wire fraud crimes.[11] We held that Congress "may constitutionally make the commission of crimes within a specified period of time and within the course of a particular type of enterprise an independent criminal offense. . . ." 643 F.2d at 413. We now hold that there was no violation of double jeopardy in trying defendants Liberatore and Ciarcia for both the federal bribery charge and the RICO charge.

VIII. The District Court Did Not Err in Its Evidentiary Rulings

We have reviewed defendants' challenges to various evidentiary rulings made by the District Court in admitting:

1) references to court-ordered electronic surveillance of Licavoli in which the agent referred to Licavoli's activities as "criminal";

2) references to prosecution witnesses as being in the Witness Protection Program as suggesting that defendants had threatened the witnesses;

3) references to plea bargaining agreements as suggesting that the government vouched for the truthfulness of the witness' testimony;

4) the admission of co-conspirator statements under Fed. Rule Evid. 804(d)(2)(E) as violating the confrontation clause of the sixth amendment.

We find all of these challenges to be without merit.

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[11] Appellants Liberatore and Ciarcia are serving concurrent, not consecutive sentences for their bribery and RICO convictions.

IX. The District Court Did Not Err in Denying Defendants' Motion for Severance

Defendants Licavoli, Calandra and Cisternino argue that the District Court erred in failing to grant their motions for severance at trial under Rule 14, Fed. R. Crim. Pro. They argue that they were prejudiced by evidence offered against other defendants at trial, and that the court's instructions to the jury could not have obviated that prejudice. Defendants complain primarily of evidence of bribery introduced against Liberatore and Ciarcia.

Rule 14 provides that severance may be granted if substantial prejudice would result to an individual defendant tried jointly with another.[12] The question of whether to grant a motion for severance is committed to the trial court's discretion, and rulings under Rule 14 are reviewable only on abuse of discretion. *United States* v. *Goldfarb*, 643 F.2d 422, 434 (6th Cir.), *cert. denied*, 454 U.S. 827 (1981); *United States* v. *Bright*, 630 F.2d 804, 813 (5th Cir. 1980); *United States* v. *Mardian*, 546 F.2d 973, 977 (D.C. Cir. 1976) (en banc); *United States* v. *Marionneaux*, 514 F.2d 1244, 1248 (5th Cir. 1975), *cert. denied*, 434 U.S. 903 (1977).

The general rule in conspiracy cases is that persons indicted together should be tried together. *United States* v. *Robinson*, 707 F.2d 872, 879 (6th Cir. 1983); *United States* v. *Dye*, 508 F.2d 1226, 1236 (6th Cir.), *cert. denied*, 420 U.S. 974 (1975); *United States* v. *Echeles*, 352 F.2d 892, 896 (7th Cir. 1965). This is particularly the case when, as here, offenses charged may be established against all the defendants with the same evidence. *United States* v. *Hamilton*, 689 F.2d 1262, 1275

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[12] Rule 14 provides in relevant part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. * * *

(6th Cir.), *cert. denied*, ____ U.S. ____, 103 S.Ct. 753 (1982); *Dye*, 508 F.2d at 1236; *United States* v. *McPartin*, 595 F.2d 1321, 1333 (7th Cir. 1979). The potential prejudice to the defendant must be balanced against competing societal goals of efficient and speedy trials. *United States* v. *Davis*, 707 F.2d 880 (6th Cir. 1983); *United States* v. *Kopituk*, 690 F.2d 1289, 1317-18 (11th Cir. 1982); *Dye*, 508 F.2d at 1236; *United States* v. *Rogers*, 475 F.2d 821, 828 (7th Cir. 1973). However, a single joint trial is impermissible if it violates a defendant's right to a fundamentally fair trial. *Echeles*, 352 F.2d at 896; *Barton* v. *United States*, 263 F.2d 894, 898 (5th Cir. 1959).

Courts have put a heavy burden on defendants seeking severance, requiring a strong showing of prejudice. *Opper* v. *United States*, 348 U.S. 84, 94 (1954); *Hamilton*, 689 F.2d at 1275; *Bright*, 630 F.2d at 813; *United States* v. *Marable*, 574 F.2d 224, 231 (5th Cir. 1978). An especially compelling showing is required in RICO prosecutions. As the court noted in *United States* v. *Provenzano*, 688 F.2d 194, 199 (3d Cir.), *cert. denied*, ____ U.S. ____, 103 S.Ct. 492 (1982), "in a case of this nature it is preferable to have all of the parties tried together so that the full extent of the conspiracy may be developed."

Upon a careful review of the record we cannot say that defendants have shown the compelling prejudice required for a granting of severance. At the heart of defendants' severance claim is the fact that some of them were not named in all three of the predicate racketeering acts for which evidence was introduced. We recently held in *Davis* that this circumstance alone does not necessitate severance. 707 F.2d at 883. The jury was carefully instructed that the evidence of bribery was admissible only against Liberatore and Ciarcia, and there is nothing in the record to indicate that the jurors were confused or misled. Testimony regarding the other defendants in connection with the circumstances of the bribery was tangential, and overshadowed by the major role in the events played by Liberatore and Ciarcia. The slight potential

prejudice to defendants Licavoli, Calandra and Cisternino in this case by these tangential references is outweighed by the judicial and societal interests in trying all of the defendants together. We hold that the trial judge did not abuse his discretion in denying defendants' motion for severance.

X. The District Court Did Not Err in Declining to Excuse a Juror during the Trial

Mr. McCourt, a juror in defendants' RICO trial, discovered late in the presentation of the government's case that he was acquainted with one of the government's witnesses, a Ms. Weiss who managed the apartment house involved in the aborted bombing attempt. Mr. McCourt knew Ms. Weiss because his aunt and uncle lived in the same building as Danny Greene, but had not known Ms. Weiss' last name until he saw her at trial.

Defendant Licavoli maintains that the juror "wilfully concealed material facts bearing on his suitability." However, Mr. McCourt had stated during jury selection that he had had some contacts with Danny Greene. He could not have concealed his acquaintance with the witness because he did not know that she would be a witness until he saw her at trial. At that time he promptly informed the court that he knew Ms. Weiss. The trial judge then questioned Mr. McCourt regarding his ability to make an impartial judgment, and Mr. McCourt said that he felt he could. It is hard to see how Mr. McCourt's nodding acquaintance with a minor witness for the prosecution could have seriously prejudiced defendants. Ms. Weiss testified that Danny Greene lived with a woman in the apartment building that she managed, and that she had found a box and a bottle on the property. These facts were not in dispute, and counsel for defendant Licavoli chose not to cross-examine Ms. Weiss. Mr. McCourt had personal knowledge that older people frequently congregated in the lobby of the building, but this fact was also not in dispute. Accordingly

we hold that the District Court did not err in its failure to excuse Mr. McCourt.

XI. The District Court Did Not Err in Denying Liberatore's Motion for a New Trial

Defendant Liberatore appeals a denial of a motion for a new trial on his federal bribery conviction. Liberatore argues that there were significant inconsistencies in the testimony of witnesses who testified against him. The District Court found these inconsistencies to be insubstantial, and, having reviewed the record, we agree.

Defendants have raised a number of other claims, which we do not discuss here. We have considered these and find them without merit. We affirm defendants' RICO convictions and affirm the District Court's denial of Liberatore's motion for a new trial.

MERRITT, Circuit Judge, concurring. I concur in the clear and well reasoned opinion prepared by Judge Kennedy.

It may seem strange for a federal court to uphold convictions under a federal statute based on two underlying predicate state offenses for which a defendant has either been acquitted at state trials (the murder of Danny Greene) or for which he could not be separately convicted or punished under state law (conspiracy to murder Danny Greene). But RICO is now unique. The normal rules of construction do not apply to RICO. Although I had earlier believed that normal canons of construction applicable to other criminal statutes should be applied to RICO, *see United States* v. *Sutton*, 605 F.2d 200 (1979), *reversed en banc*, 642 F.2d 1001, 1042 (6th Cir. 1980) (Merritt, J., dissenting), the Supreme Court has now made it clear that RICO is to be given the broadest and most expansive possible interpretation in order to carry out Congressional intent aimed at eliminating organized crime. *See United States* v. *Turkette*, 452 U.S. 576 (1981) (RICO not limited to infiltration of a legitimate "enterprise"); *Russello* v. *United States*, 104 S.Ct. 296 (1983). In *Russello*, a unanimous Supreme Court has pointed to RICO as the only federal criminal statute which should receive this kind of broad and expansive interpretation:

> The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots. . . . Further, Congress directed, by § 904(a) of Pub. L. 91-452, 84 Stat. 947: "The provisions of this title shall be liberally construed to effectuate its remedial purposes." *So far as we have been made aware, this is the only substantive federal criminal statute that contains such a directive.* . . .

104 S.Ct. at 302. (emphasis added). Thus, RICO, liberally construed as required by the Supreme Court, can reasonably be interpreted, and therefore should be interpreted,

so that a defendant can be convicted even though he has already been acquitted or convicted of the two underlying offenses in state court and even though he could not be convicted or punished for both offenses together under state law.

In view of the Supreme Court's decisions in *Turkette* and *Russello*, I therefore agree with our Court's expansive construction of RICO in sections II, III, IV and VII.

On the question of the admissibility of Ferrito's prior testimony in the three state trials, the existence of the "enterprise" element in RICO is not a bar to admissibility, as defendants argue, because the "enterprise" element, in light of the Supreme Court's holding in *Turkette*, has become a fiction. It has become synonymous with another element of the offense, namely, the "pattern of racketeering activity," *i.e.*, the two underlying state offenses. The "enterprise" element now adds nothing to the so-called "pattern" element. The two predicate offenses are the "enterprise." All that is now required for a RICO offense is the commission of two predicate offenses which the state defines as separately chargeable and separately punishable. No further indicia of "enterprise" is now necessary.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Filed June 3, 1982

UNITED STATES OF AMERICA *Plaintiff*	)	CR79-103
V.	)	
JAMES T. LICAVOLI, *et al* *Defendants*	)	

MEMORANDUM AND ORDER

THOMAS, *Senior Judge*

Pursuant to Fed.R.Crim.P. 29(a), defendant Licavoli moves for a judgment of acquittal. After study of the motion and supporting brief filed on May 19, this court determines that legal, not evidentiary issues, are presented. Hence, the court need not await the closing of the government's presentation of evidence to consider and rule upon the serious legal issues raised by defendant Licavoli.

I.

Defendant Licavoli contends that the alleged conspiracies to kill Daniel Greene and John Nardi cannot be considered as predicate acts under 18 U.S.C. §1961. Defendant argues that "the legislative history of §1961 . . . demonstrates beyond doubt that Congress decided not to include the crime of conspiracy as a separate act of racketeering." Defendant does not cite any legislato's statement. Rather, he refers to the absence in the law's final language of conspiracy provisions contained in two Senate bills, S 1623 and S 1861. Title IX of the Organized Crime Control Act of 1970 (Chapter 96 — "Racketeer-

Influenced Corrupt Organizations'' of 18 U.S.C. §901[a]) was substituted for these bills.

S 1623 (authored by Senator Hruska, R-Neb.) was introduced on March 20, 1969 as a possible amendment to Title 18 of the United States Code. The amendment sought to control the infiltration of legitimate business by criminals through the investment of money gaied through criminal activities. Named the ''Criminal Activities Profits Act,'' the bill defined ''criminal activity'' as:

> (A) Any act involving murder, kidnapping, extortion, bankruptcy fraud, or the manufacture, importation, receiving, concealment, buying, or otherwise dealing in narcotic drugs or marihuana which is punishable under any statute of the United States:
>
> (B) Any act which is punishable under [any of a number of enumerated provisions of] Title 18, United States Code; and
>
> (C) Any conspiracy to commit any of the foregoing offenses.

On April 18, 1969, S 1861 was introduced by Senator McClellan (D-Ark.). S 1861, broader in scope than S 1623, also sought to control the investment of illegally obtained funds. Cited as the ''Corrupt Organizations Act of 1969,'' S 1861 stated that its purpose was:

> To amend Title 18, United States Code, to prohibit the infiltration or management of legitimate organizations by racketeering activity or the proceeds of racketeering activity, where interstate or foreign commerce is affected, and for other purposes.

Section 1961 of S 1861 defined ''racketeering activity'':

> (1) The term ''racketeering activity'' means (A) any act involving the danger of violence to life, limb, or property, indictable under State or Federal law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following [cited] provisions of Title 18, United States Code; and (C) any conspiracy to commit any of the foregoing offenses.

As enacted into law and signed by the President on Octo-

ber 15, 1970, §1961(1) of the "Racketeer-Influenced and Corrupt Organizations Act" defines "racketeering activity" as:

> (A) Any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year;
>
> (B) Any act which is indictable under any of the following provisions of Title 18, United States Code: [enumerated provisions follow];
>
> (C) Any act which is indictable under Title 29, U.S.C., §186 . . . or §501(c) . . . ; or
>
> (D) Any offense involving fraud connected with a case under Title 11, fraud in the sale of securities, or [various drug offenses].

Thus, as enacted, §1961(1) omitted subdivision (c), the conspiracy catch-all provision contained in both S 1623 and S 1861. Defendant Licavoli argues that this is a "delet[ion]" that "plainly demonstrates Congress' intention not to make conspiracy a separate act of racketeering."

The legislative history does not reflect or refer to the dropping of the conspiracy provisions of S 1623 and S 1861. However, the Senate legislative history chronicles the replacement of the S 1861 wording of §1961(1)(A) (including the conspiracy provision) with language proposed to the Senate Judiciary Subcommittee on Criminal Laws and Procedures by the Department of Justice.

In a letter of August 11, 1969, Richard G. Kleindienst, Deputy Attorney General of the United States, responded to the subcommittee's request for the Department of Justice's views on S 1861. In his letter, Mr. Kleindienst stated:

> Section 1961 is a definition section containing the definition of such terms as racketeering activity, interstate commerce, State, person, enterprise, pattern of racketeering activity, unlawful debt, racketeering order, racketeering investigation, racketeering violation, racketeering investigator, and documentary material.
>
> It is felt that the definition of the term "racketeering activity" contained in §1961(1)(A), any act involving

> the danger of violence to life, limb, or property indictable under state or Federal law and punishable by imprisonment for more than one year, is too broad and would result in a large number of unintended applications as well as tending towards complete federalization of criminal justice. It is suggested, therefore, that §1961(1)(A) be redefined as follows:
>
> (1) The term "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, usury or dealing in narcotic drugs, marihuana or other dangerous drugs which is indictable under State law and punishable by imprisonment for more than one year.[1]

In his criticism of S 1861, Mr. Kleindienst did not mention the conspiracy provision. Nor did he discuss any federal criminal statute which might be a predicate for "racketeering activity." Instead, he dwelt on the Department's concerns about the wording of §1961(A) as it related to state crimes as predi-predicates for "racketeering activity." The Department of Justice expressed the feeling that the language "any [indictable] act involving the danger of violence to life, limb, or property" was "too broad and would result in a large number of unintended applications." The Department saw this as tending "towards [a] complete federalization of criminal justice."

The Senate Judiciary Committee on January 21, 1970 brought S 30 to the Senate floor. Portions of S 1861 had been incorporated into S 30 to comprise Title IX of this omnibus bill which became the Organized Crime Control Act of 1970. With reference to Title IX, Senator McClellan, the principal author and proponent of the bill, told the Senate on that day:

> The subcommittees and the full committee have now agreed with the Department of Justice on their suggested revisions and, along with other improving amendments, have approved Title IX.

See 116 Cong. Rec. 36,295 (Oct. 12, 1970). Senator McClel-

1. Hearings before the Subcommittee on Criminal Laws and Procedures of the Committee of the Judiciary, United States Senate, on measures relating to organized crime; 91st Cong., 1st Sess. Vol. 4, p. 405 (1969).

lan was obviously referring to the revisions suggested by Deputy Attorney General Kleindienst in his letter of August 11, 1969. A comparison of the Department of Justice's suggested revisions with §1961(1) of S 30 shows that the Senate Judiciary Committee adopted the Department's substitute language with only three changes. The crime of "usury" was deleted from the list of state crimes; the words "drugs, marihuana" were deleted to make the phrase read "narcotic or other dangerous drugs"; and "chargeable under state law" was substituted for "indictable under state law."

Without any further change in the wording of Title IX, §1961(1), S 30 was passed by the Senate on January 23, 1970. Similarly, no change in this language occurred in the House, although amendments to other titles of S 30 were made by the House. The House passed S 30 on October 7, 1970. On October 12, 1970 the Senate determined to accept the House amendments and passed S 30 on the same day. The President signed the bill into law on October 15, 1970.

In this court's memorandum and order of March 5, 1982 it determined that

> Section 1961(1)(A), relating to crimes chargeable under state law, speaks of "any act or threat *involving* murder, kidnapping, gambling . . . " [Emphasis added.] The subsection does not say "any act or threat of murder . . . " The term "involving" suggests a broader scope and an intent to include other acts in addition to the substantive crime. This broad reading of an "act" includes the crime of conspiracy. . . .

The Department of Justice suggested the broad words "any act . . . involving" as part of the substitute language for §1961(1)(A) while it made no reference to the dropping of the conspiracy provision (subsection [c]). There also is no reference to the dropping of the conspiracy provision in the Senate Report[2] in which the Department's suggested §1961(1)(A) language is approved and adopted. No inference, therefore, that the Senate intended to exclude conspiracy acts, criminal

2. See S.Rep. No. 91-617, 91st Cong., 1st Sess., p. 121 (1969).

under state law, from §1961(1)(A) may reasonably be made. To the contrary, it is reasonable to infer that the Department and the Senate Judiciary Committee concluded that incorporation of the words "any act . . . involving" intended a scope broader than the substantive crime, thus including "conspiracy to murder, kidnap, etc."

Immediately after suggesting a substitute §1961(1)(A), Deputy Attorney General Kleindienst explained:

> It is felt tht by thus narrowing the definition of the class o applicable state crimes in terms of their generic meaning, the definition of "racketeering activity" contained in §1961(1)(A) will be both broad enough to include most state statutes customarily invoked against organized crime, yet narrow enough to be constitutional. *United States v. Nardello,* 393 U.S. 286 (1969).

The key to interpreting the proposed language, later adopted into S 30 and enacted into law, is Mr. Kleindienst's suggestion that the new language would narrow the definition of the "class of applicable state crimes in terms of their generic meaning." Thus defined, the "definition of 'racketeering activity' contained in §1961(1)(A)" is "broad enough to include most state statutes customarily invoked against organized crime." When each of the enumerated state crimes is given its "generic meaning," the particular crime, *e.g.,* "murder," relates to or is "descriptive of [its] entire group or class; general . . . " *American Heritage Dictionary* (1969), p. 549. Given its generic meaning, the "group or class" of the Ohio crime of murder embraces "conspiracy to murder" as well as the substantive crime of murder.

The Senate's adoption of suggested substitute §1961(1)(A) and inclusion of the "state offenses by generic designation" is exhibited in the Senate Report's close tracking of the Kleindienst letter in the section-by-section analysis of the Organized Crime Control Act:

> Section 1961 contains definitions.
>
> Subsection (1) defines "racketeering activity" to include those crimes most often associated with organized

> crime, especially those associated with the infiltration of legitimate organizations. Those crimes are murder, kidnapping, gambling, arson, bribery, extortion, narcotic violations; counterfeiting; usury; mail, bankruptcy, wire and securities fraud; and obstruction of justice. The state offenses are included by generic designation. *Cf. United States v. Nardello*, 393 U.S. 286, 292 (1969). The Federal offenses are included by specific reference. The term "racketeering activity" is a key statutory term. Under proposed §1962, below, the racketeering activity is one of three prerequisites to commission of an offense. If there is no racketeering activity, there can be no violation of the provisions of this title.

S.Rep. No. 91-617, 91st Cong., 1st Sess., at p. 158 (1969).

Moreover, it is evident that a conspiracy statute is one which a state may invoke "against organized crime," a stated purpose of substituted §1961(1)(A). As stated by the Senate:

> It is the purpose of this act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime. See Organized Crime Control Act, P.L. 91-452, "Statement of Findings and Purpose."

The statute further provides that:

> The provisions of this title shall be liberally construed to effectuate its remedial purposes. See P.L. 91-452, §904(a), at 1970-1, U. S. Code; *Cong. and Admin. News*, 2nd Sess., at p. 1104.

Hence it is concluded that conspiracy to commit one of the §1961(1)(A)-proscribed acts "is chargeable under State

law and punishable by imprisonment for more than one year."[3] "Conspiracy to murder" is classified as "racketeering activity" under RICO.

II.

Relying on the Ohio conspiracy statute, §2923.01(F), defendant Licavoli argues, "This statute mandates the conclusion that any conspiracy here to kill *Greene and Nardi* simply cannot be fragmented into two (2) predicate acts by the government in its quest for a RICO conspiracy conviction." Before examining §2923.01(F), defendant Licavoli's argument needs to be placed in the context of the RICO conspiracy charge which is on trial.

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3. Defendant Licavoli cites *United States v. Weisman*, 624 F.2d 1118 (2nd Cir. 1980), as additional support for his argument. In *Weisman*, the Second Circuit held that "conspiracy [could] properly be charged as a predicate act of racketeering under RICO, at least when it involves any of the substantive offenses listed in §1961(1)(D)." *Ibid.*, at 1123. In reaching its decision, the Second Circuit referred to the deletion of the early drafts' conspiracy language from the final version of §1961. The court stated:

> Thus, the alterations of §1961(1) are most logically interpreted as an attempt to restrict the conspiracies chargeable as predicate offenses to those involving offenses listed in subsection (D).

Ibid., at 1124. Defendant Licavoli argues that under *Weisman*, §1961(1)(A) cannot include conspiracy offenses.

In reaching its determination, the Second Circuit compared the language of subsection D to that used in subsections B and C of §1961(1). Sections B, C and D all deal with federal crimes. Thus, the Second Circuit was impressed by the use of "any offense involving" in subsection D as opposed to the use of "any act which is indictable under [specific sections of the United States Code]" in subsections B and C. The court concluded that subsections B and C "require that the [charged] act be indictable under specifically enumerated sections of the [federal] criminal code." *Ibid.*, at 1124.

However, the Second Circuit's *ratio decidendi* does not extend to subsection A. *Weisman* did not involve any alleged conspiracy acts under §1961(1)(A). Indeed, the court did not expressly examine the legislative history chronicled in Part I, *supra*; nor did it specifically analyze or address the scope and breadth of subsection A. Subsection A deals with "acts or threats involving" designated state crimes chargeable and punishable under State law. *Weisman* was decided solely in a federal context. Thus, as recognized in *United States v. Welch*, 656 F.2d 1039, 1063, n. 32 (5th Cir. 1981), *Weisman* did not settle the issue of "whether a charge of conspiracy to murder is a proper predicate act for a RICO charge."

Defendants are charged with a violation of 18 U.S.C. §1962(d), which reads as follows:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Section (c), the applicable substantive provision, provides:

> It shall be unlawful for any person employed or associated with any enterprise engaged in or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeerin activity or collection of unlawful debt.

A " 'pattern of racketeering activity' requires at least two acts of racketeering activity. . . . " 18 U.S.C. §1961(5). "Racketeering activity" is defined to include

> any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year.

18 U.S.C. §1961(1)(A).

The indictment charges that defendant Licavoli (and likewise defendants Calandra, Cisternino and Carabbia) committed three predicate acts chargeable under state law: conspiracy to murder Nardi, conspiracy to murder Greene, and the murder of Greene. Defendant Licavoli questions whether a conspiracy to murder Nardi and a conspiracy to murder Greene are separately "chargeable under State law" and "punishable by imprisonment for more than one year." Defendant Licavoli argues that under division (F) there exists here only one conspiracy, not separate conspiracies to murder Greene and to murder Nardi.

O.R.C. §2923.01(F) reads:

> A person who conspires to commit more than one offense is guilty of only one conspiracy, when such offenses are the object of the same agreement or continuous conspiratorial relationship.

Division (F) is explained in the Committee Comments to the law as enacted as part of the revision of Ohio's criminal code, effective January 1, 1974:[4]

> This section states that even though a conspiracy may include plans to commit more than one offense, it is still one conspiracy when these offenses are part of the same plan, agreement, or continuous conspiratorial relationship.

No reported Ohio case has considered or applied the concept set forth in division (F).

In *Braverman v. United States*, 317 U.S. 49 (1943), the issue was

> [w]hether a conviction upon the several counts of an indictment, . . . where the jury's verdict is supported by evidence of but a single conspiracy, will sustain a sentence of more than two years' imprisonment, the maximum penalty for a single violation of the conspiracy statute. . . .

The defendant had been charged with conspiracy to violate several different provisions of the Internal Revenue laws. The Court held that when a single agreement is the prohibited conspiracy, only a single penalty may be imposed. The following reasoning is important:

> For when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. *Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes.*
>
> • • •
>
> Since the single continuing agreement, which is the conspiracy here, thus embraces its criminal objects, it differs from successive acts which violate a single penal statute and from a single act which violates two statutes.

Ibid., at 53-54.

Similarly, in *United States v. Adcock*, 487 F.2d 637 (6th Cir. 1973), the court held that where a defendant is charged

with conspiring to violate two separate statutory provisions but the case involves "a single conspiracy having as its ultimate purpose the violation of more than one substantive offense," *ibid.* at 639, it is error to sentence the defendant on both counts. The test is whether "despite the fact that defendants may have had more than one illegal objective . . . only a single agreement existed among the defendants and the other conspirators to commit these unlawful acts." *Ibid.*, at 639.

While this court must look to the state criminal law to ascertain the nature of the crime of conspiracy underlying the predicate acts charged under state laws, it is manifest that a limitation on the law of conspiracy is recognized by the federal courts and that this limitation coincides with the express language of §2923.01(F). Thus, it is essential to look at the facts presented in this case to see whether there is evidence of only one agreement to kill Nardi and Greene or of separate agreements to kill each man.[5]

The testimony of Raymond J. Ferritto in the three state proceedings as read into eviddence in this case tends to show that three meetings were held in the late spring and summer of 1976. The first meeting was with Jimmy Fratianno at the Town and Country Motel in Warren, Ohio in May of 1976. Fratianno told him that "they were having some problems in Cleveland and that he thought [Ferritto] should talk to Tony DelSanter, and that maybe [Ferritto] could make some money with him." Ferritto described further his conversation with Fratianno:

> He said they were having problems there, and that somebody was trying to hustle in, and that Tony might have some work for me and I might make some money with him.

When asked what "work" meant, Ferritto responded, "I took it to mean that he wanted somebody taken care of . . . somebody killed."

---

5. The testimony of Raymond J. Ferritto will be considered as it goes to the issue currently before the court. The court is not suggesting that the testimony is applicable only to this issue; indeed, it may be relevant to the federal RICO conspiracy charge.

"A couple of weeks later" Fratianno called Ferritto again to arrange a meeting in Warren with DelSanter. Ferritto described the subsequent meeting at Cherry's Restaurant:

> We exchanged greetings, and we sat down, and Fratianno said, "You guys have something to talk about," . . . and he left.
>
> • • •
>
> [DelSanter] asked me if Fratianno had told me about the problems that they were having, and I told him just that he said that someone was trying to muscle in on the gambling in Cleveland. But he didn't say who.
>
> And so DelSanter went on and told me that the two fellows were Nardi — John Nardi and Greene, from Cleveland, and they were muscling in on the gambling operations in Cleveland. And that he wanted them — something had to be done with them, that they had to be taken care of. And if I was interested.
>
> Q: Did you say anything?
>
> A: I said that I was interested, but I wanted to know what was in it for me. And he said that he would have to ask Jack, Jack White, he said, because he's the boss.
>
> Q: Do you know who Jack White is?
>
> A: Yes.
>
> Q: Does he go by any other name?
>
> A: Licavoli.

"Two or three weeks later," Ferritto received a telephone call from Ronald Carabbia telling him to attend a dinner meeting at Cherry's the next night. Ferritto testified that he "met Cisternino, Carabbia, Tony DelSanter [and] Jack White" at the restaurant. He related the following about the conversation:

> Tony DelSanter told Jack that I was interested in the work, and that I wanted to know what monetary returns I would get.
>
> Q: Did Jack say anything to you?
>
> A: He said that I would be taken care of.
>
> • • •

Q: In regards to the work that you were considering doing, did they discuss that matter any further with Mr. White and the other people at the table?

A: Yeah, I accepted the terms, and I said that when they got the — when they were ready, to call me. When they got the legwork done to call me.

The clear import of the Ferritto testimony is that he was hired to "take care of" the people "muscling in" on the Cleveland gambling operations. That "work" would involve the killing of Greene and Nardi.

This court finds that the facts offered through the Ferritto testimony support defendant Licavoli's argument that there exists here a single agreement, a single conspiracy to murder. As part and purpose of that agreement, several acts of murder would be committed. However, "it is . . . [the] agreement which constitutes the conspiracy which the statute punishes," *Braverman*, 317 U.S., at 53; and this court holds that on the facts of this case only a single agreement can be shown to have existed.

Under such circumstances, O.R.C. §2923.01(F) permits defendant Licavoli, and indeed all of the defendants, to be charged with only a single conspiracy. The agreement cannot be bifurcated to permit separate conspiracy charges for each of the alleged targets. Since under the evidence as read most favorably for the prosecution the defendants could not be charged under state law with separate conspiracies to murder Nardi and to murder Greene, those individual conspiracies may not be used as separate predicate acts to support an 18 U.S.C. §1962(d) conspiracy charge.

As a question of law, this court concludes that the alleged predicate acts of conspiracy to murder Nardi and conspiracy to murder Greene must be treated as one conspiracy to murder. The jury will be appropriately instructed on the following subject. As an element of the RICO conspiracy, the jury must determine that as to defendants Licavoli, Calandra, Cisternino and Carabbia each committed the following two predicate acts: (1) conspired to murder Daniel Greene and/or John Nardi;

and (2) murdered, or aided and abetted in the murder of, Daniel Greene.

As to defendants Liberatore and Ciarcia, the jury will be instructed that it must determine that each committed two of the following predicate acts: (1) conspired to murder Daniel Greene; (2) murdered, or aided and abetted in the murder of, Daniel Greene; (3) in or about October 1977, gave things of value, including approximately $14,900, more or less, to Geraldine Rabinowitz, also known as Geraldine Linhardt, an employee of the Federal Bureau of Investigation of the U. S. Department of Justice, in violation of 18 U.S.C. §201(b)(3).

III.

Defendant Licavoli further argues that the government cannot fragment

> a unified conspiracy (that is, to kill Greene and Nardi), which charge, by force of §2923.01(G) upon conviction would merge into the substantive murder offense involving Greene, into more than one predicate act so as to accommodate the RICO charge made in this indictment.

O.R.C. §2923.01(G) reads:

> When a person is convicted of committing or attempting to commit a specific offense or of complicity in the commission of or attempt to commit such offense, he shall not be convicted of conspiracy involving the same offense.

In essence defendant Licavoli is arguing that because division (G) requires that the conspiracy and substantive charges merge upon conviction of the substantive offense, conspiracy to murder and murder cannot be set forth as separate predicate acts.

Defendant Licavoli's argument would be applicable if he was being prosecuted in a state court of Ohio for conspiracy to murder after conviction for the substantive offense of murder. But it is pertinent to repeat what was said in another context in this court's memorandum and order of March 5, 1982:

> This criminal prosecution is for the violation of a federal criminal statute. The defendants have not been charged

> with commission of the state crimes; they cannot be convicted of the state crimes. The state crimes referred to are definitional only. *United States v. Frumento*, 563 F.2d 1083 (3rd Cir. 1977), *cert. denied sub nom. Millhouse v. United States*, 434 U.S. 1072 (1978).

Previously, in *United States v. Forsythe*, 560 F.2d 1127 (3rd Cir. 1977), the Third Circuit had explained the incorporation of state criminal offenses for "definitional purposes," stating:

> RICO is a federal law proscribing various racketeering acts which have an effect on interstate or foreign commerce. Certain of those racketeering, or predicate acts violate state law and RICO incorporates the elements of those state offenses for definitional purposes. *State law offenses are not the gravamen of RICO offenses. RICO was not designed to punish state law violations;* it was designed to punish the impact on commerce caused by conduct which meets the statute's definition of racketeering activity. *To interpret state law offenses to have more than a definitional purpose would be contrary to the legislative intent of Congress and existing state law.*

Ibid., at 1135 (emphasis added).

Similarly, in *United States v. Malatesta*, 583 F.2d 748, 758 (5th Cir. 1978), *cert. denied sub nom. Bertolotti v. United States*, 440 U.S. 962 (1979), the court repeated prior Fifth Circuit determinations that "the reference to state law in the federal statute is for the purpose of defining the *conduct* prohibited. . . ."

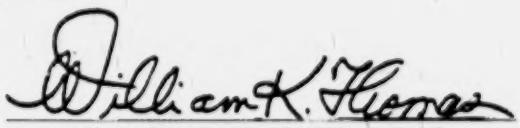
The present question is whether the predicate acts set forth in the indictment, the conspiracy to murder and the murder, are "chargeable," *i.e.*, defined, under state law. Clearly in two separate counts of an indictment a person can be charged in Ohio with conspiracy to commit an offense and the substantive offense. There is nothing in state law that requires a prosecutor to elect between the substantive offense and the conspiracy. Rather, §2923.01(G) requires a merger of the charges only upon *conviction*. Because defendants here will not be *convicted* of the state law crimes, the bar of division (G) is not applicable. Division (G) operates either to bar double sentences, as stated by this court in its March 5, 1982 memo-

randum and order, or to bar successive prosecutions for conspiracy and the substantive offense. It has no effect on the *charging* of a defendant with certain crimes. Nor does §2923.01(G) constitute any of the elements of the offense of "conspiracy to murder" under Ohio law, which the United States must prove to establish a predicate act.

The laws of Ohio define the crimes of conspiracy to commit murder and murder. Thus these crimes are separately "chargeable under State law." Therefore, it is concluded that conspiracy to murder and murder may be set forth as separate predicate acts in a RICO substantive charge (§1962[c]) and thus in a RICO conspiracy charge (§1962[d]).

Defendant Licavoli's motion for acquittal is denied as to all grounds asserted in his supporting brief.

IT IS SO ORDERED.



U. S. DISTRICT SENIOR JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Filed June 22, 1982

UNITED STATES OF AMERICA *Plaintiff*	)	CR79-103
V.	)	
JAMES T. LICAVOLI, *et al* *Defendants*	)	

MEMORANDUM AND ORDER

THOMAS, *Senior Judge*

Each of the defendants has moved for acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The basis of a Rule 29 motion is that "the evidence is insufficient to sustain a conviction of" the offense or offenses "charged in the indictment." All defendants argue that the evidence is insufficient. Defendants intertwine arguments that:

(1) An "enterprise" has not been proved;

(2) The RICO conspiracy duration terminated with the death of Daniel Greene on October 6, 1977; and

(3) The government's evidence presents "multiple conspiracies" rather than a "single conspiracy."

First, the court turns to matters already ruled upon but reargued in connection with the Rule 29 motions.

Among his acquittal arguments defendant Licavoli incorporates his argument contained in his motion and supporting brief of May 19 that "the legislative history of §1961 . . . demonstrates beyond doubt that Congress decided not to in-

clude the crime of conspiracy as a separate act of racketeering." After an analysis of the legislative history, this court did not accept this conclusion in its memorandum and order of June 3, 1982. That conclusion is reaffirmed.

In part III of the memorandum of June 3, this court declined to accept defendant Licavoli's argument that because O.R.C. §2923.01(G) "requires that the conspiracy and substantive charges merge upon conviction of the substantive offense, conspiracy to murder and murder cannot be set forth as separate predicate acts." This court there concluded that since §2923.01(G) (Conspiracy) "requires a merger of the charges only upon conviction" and "because defendants here will not be *convicted* of the state law crimes, the bar of division (G) is not applicable [emphasis added]." That conclusion is also reaffirmed.

In a written "motion to dismiss predicate acts,"[1] defendant Liberatore also asserts merger under division (G) of O.R.C. §2923.01. Section 1961(5), defining "racketeering activity [under state law]," requires that "any act or threat involving murder . . . " be "chargeable under State law and punishable by imprisonment for more than one year." This court reiterates its conclusion that conspiracy to murder is "chargeable under state law," *i.e.*, "defined under state law." At oral argument defendant Liberatore supplemented his merger argument by dwelling on the second clause, "and punishable by imprisonment for more than one year." Use of the word "punishable" clearly renders the clause definitional in the federal assimilation of the state law. The word "punishable" does not connote, as defendant Liberatore suggests, that the state criminal law should be viewed for definitional purposes as the law is applied at the punishment stage, *i.e.*, after conviction.

A.

Based on the indictment the government charges a RICO

1. Defendant Liberatore's reading of the congressional history of the evolution of §1961 is not supported by this court's study of that history, as set forth in Part I of the memorandum of June 3, 1982.

conspiracy. Named as defendants are James T. Licavoli, also known as "Jack White"; Anthony Liberatore; John P. Calandra; Pasquale Cisternino, also known as "Butchie"; Ronald Carabbia, and Kenneth Ciarcia. Named in the indictment as alleged co-conspirators, but not as defendants, are Anthony Delsanter, also known as "Tony the Dope"; Aladena T. Fratianno, also known as "Jimmy" Fratianno; Raymond William Ferritto; Ronald A. Guiles, also known as "Vic"; and Louis J. Aratari, also known as "Tony."

During in or about May of 1976 and continuing thereafter, up to and including on or about March 3, 1978, defendants and the persons named as unindicted co-conspirators are charged with combining, conspiring and agreeing together under 18 U.S.C. §1962(d) to violate 18 U.S.C. §1962(c), the substantive RICO provision. That section makes it a crime

> for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

As part of the alleged conspiracy, it is charged in the indictment that the defendants and the unindicted co-conspirators, being associated with an enterprise engaged in and the activities of which affected interstate commerce, committed, carried on, and supervised criminal activity in various cities in the Northern District of Ohio by use of acts and threats involving murder, bribery, and other activities.

It is charged that in furtherance of the conspiracy and to accomplish its objects, the defendants and others committed the following acts and "pattern of racketeering activity" which, as predicate acts, are being submitted for the consideratio of the jury:

1. Defendants and the unindicted co-conspirators from in or about June 1976 up to and including on or about October 6, 1977, in the Northern District of Ohio and elsewhere, conspired to murder one Daniel J.

Greene in violation of Ohio Revised Code §2923.01.

2. The defendants and the unindicted co-conspirators, on or about October 6, 1977, did murder and aid and abet in the murder of Daniel J. Greene by means of an explosive device in violation of O.R.C. §2903.01.

3. Defendants Anthony Liberatore and Kenneth Ciarcia, in or about October 1977, corruptly did, directly and indirectly, give things of value, including approximately $14,900, more or less, to Geraldine Rabinowitz, also known as Geraldine Linhart, an employee of the Federal Bureau of Investigation of the United States Department of Justice, in return for confidential information contained in the official files and records of the Federal Bureau of Investigation, in violation of 18 U.S.C. §201(b)(3).

B.

All defendants charge insufficiency of proof of an enterprise. Defendant Carabbia particularly directs his Rule 29 motion to the government's alleged failure to prove the existence of an enterprise separate and apart from the commission of the enumerated predicate acts. He argues that the government has failed to prove the defendants' involvement in the activities of the alleged enterprise and that, at most, the government has offered eviddence of defendant Carabbia's participation in a state murder offense.

The indictment alleges that as part of the RICO conspiracy, the six defendants, along with several unindicted co-conspirators,

> being associated with an enterprise engaged in and the activities of which affected interstate commerce; that is, a group of individuals associated in fact to control the criminal activities in various cities in the Northern District of Ohio, by means of murder, bribery, and other activities, unlawfully, willfully, and knowingly conduct[ed] and participate[d], directly and indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity, including murder, conspiracy to murder and bribery [as to defendants Liberatore and Ciarcia].

Defendant Carabbia argues that the government cannot prove the existence of an enterprise solely through the proof of the predicate acts but must meet certain requirements set forth in *United States v. Turkette*, 452 U.S. 576 (1981), and *United States v. Bledsoe*, 674 F.2d 647 (8th Cir. 1982).

18 U.S.C. §1961(4) defines "enterprise" as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." In *Turkette* the Court defined enterprise as "an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct." *Ibid.*, at 583. Stating that "[t]he existence of an enterprise at all times remains a separate element which must be proved by the Government," the Court differentiated "enterprise" from "pattern of racketeering activity":

> The pattern of racketeering activity is . . . a series of criminal acts as defined by the statute. . . . The [enterprise] is proved by evidence of *an ongoing organization*, formal or informal, and by evidence that the various associates function as a *continuing unit*. The [pattern of racketeering activity] is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise.

Significantly, the Court then ruled:

> While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other.

The Court summarized:

> The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages.

Ibid. (emphasis added).

In *United States v. Griffin*, 660 F.2d 996 (4th Cir. 1981), the court relied upon *Turkette* in holding that to establish the existence of a "group of individuals associated in fact," *i.e.*, an illegitimate enterprise, the government must show the "pur-

pose of the association along with the composition of the group." *Ibid.*, at 999. The court noted that the government need not show a single agreement as required under traditional conspiracy law. Guilt is individualized by showing a common purpose or purposes of the group by evidence of an ongoing organization of the associates "in which they function as a 'continuing unit.' " *Ibid.*, at 1000, relying upon *Turkette*, quoted *supra*. Proof of "continuity, unit, shared purpose and identifiable structure" meets the requirement of the enterprise element. *Ibid.*

These requirements were repeated in *United States v. Bledsoe*, 674 F.2d 647 (8th Cir. 1982). The court adopted the *Turkette* distinction between "enterprise" and "pattern of racketeering activity" and set forth "three basic characteristics" of an enterprise. *Ibid.*, at 664 and 665. The first characteristic is "a common or shared purpose which animates those associated with it. . . . " The second is the functioning of the enterprise "as a continuing unit," *i.e.*, "some continuity of both personality and structure." Third, the government must show an " 'ascertainable structure' distinct from that inherent in the conduct of a pattern of racketeering activity." The court specifically mentioned the "command system of a Mafia family" as an example of an ascertainable structure.

It is clear from *Turkette* that the government's evidence going to proof of the predicate acts also may be used to prove the enterprise. Thus, the testimony of Raymond Ferritto will be reviewed and highlighted to determine whether there is proof of an enterprise, although some of the same evidence may also tend to prove the alleged predicate acts.

C.

Should the jury credit Raymond Ferritto's testimony, they may make the following findings. Between May and July 1976, James Fratianno, who Ferritto had known at Chino Prison in California, met with Ferritto in Warren as a result of a phone call from Fratianno to Ferritto. As an outgrowth of that discussion, Ferritto was introduced to Tony Delsanter a few weeks later in Warren, Ohio. In a conversation between

Ferritto and Delsanter, Delsanter told Ferritto that there were problems in Cleveland with two people, one by the name of Nardi and one by the name of Greene: "They were trying to muscle in on some of the gambling activities there and that he wanted these people taken care of."

A few weeks later a dinner meeting occurred in Warren, instigated by a call from Ronald Carabbia of Youngstown to Raymond Ferritto. At the meeting were Tony Delsanter, Jack White, Pasquale Cisternino, Ronald Carabbia and Raymond Ferritto. Ferritto testified that the proposition made to him by Delsanter came up. When he asked what he would get, Jack White told him that he would be taken care of. Ferritto accepted the proposition and told them to get in touch with him when they were ready. Later Jack White told him he was to receive "25% of all the gambling and things that were going on in the Warren-Youngstown area."

At another meeting in April 1977, also in Warren, Ferritto talked with Delsanter, Carabbia, Cisternino and John Calandra. Ferritto asked if the deal made earlier was still good, and he was told by Calandra and Delsanter that it was. Ferritto testified to a number of acts which he performed in attempting to murder Greene. He and Cisternino stalked Greene a number of times during the summer of 1977. They went to Greene's apartment at 15500 Lake Shore on several occasions looking for Greene. He said that in September he and Cisternino placed a bomb box near the front door of Greene's apartment with the intention of detonating a bomb as Greene entered or left the building. The bomb box, in evidence, and expert testimony indicate that its open side makes it a shaped charge. Cisternino had put "nails and stuff like that" in a white plastic bottle which Ferritto placed nearby.

After Delsanter's funeral in August 1977, White, Calandra, Carabbia, Cisternino and Ferritto met in Warren. Ferritto told White what he was having problems finding Greene. Greene had no formed habits. He never kept his appointments and was hard to pin down. He also carried a gun. White told him that they were about to put a wiretap on Greene's telephone

in his apartment and they should be getting better information. At this same meeting White told him that Calandra would get him expense money. Soon Carabbia gave him $5,000.

The tapes from the Greene wiretap, when played on a tape recorder, were garbled and not distinguishable. Cisternino, after having Ferritto's tape recorder checked, reported that the tapes did not play on Ferritto's recorder because it had to be run at the same speed as the one that was taping the conversations on the phone tap. With Cisternino's tape recorder, two tapes played clearly.

In early October a call from Ronald Carabbia directed him to come to Struthers. After meeting at his vending company, they drove to Mosquito Lake. Jack White, John Calandra, Pasquale Cisternino, Ronald Carabbia and Raymond Ferritto talked on a boat. At first they thought the Greene situation should be left alone for a while. Then he was asked to listen to a tape on which Greene's girl friend made a dental appointment for him on Thursday of that week at 2:30. The dentist had an office in the Brainard Place building. It was decided to give it a shot. Changing his story from his grand jury testimony in which he named Pasquale Cisternino as his accomplice on October 6, 1977 at Brainard Place, Raymond Ferritto testified at the state court trials that his companion was Ronald Carabbia. At Brainard Place, a red Nova bomb car, which they had placed alongside of Greene's car, was detonated by them by radio control. Greene was killed as he approached the driver's side door of the Lincoln Continental (owned by Keith Ritson). Ferritto's testimony both at the grand juty and at trial was that the bomb was put together by Pasquale Cisternino with Ferritto's assistance at 333 Winchester Apartments on the morning of October 6.

Assuming the jury should make these findings, may they also conclude that White, Delsanter, Carabbia, Cisternino, Calandra and Ferritto comprised an "enterprise"?

While the meetings of the members of the group covered more than a year, the evidence permits findings about the group that are more pervasive. The jury could reasonably find

that the group was concerned about its gambling activities in Cleveland and believed that Nardi and Greene were trying to muscle in on those activities. Such a finding satisfies the first characteristic of an "enterprise." The members of the group (including the defendants) had a "common shared purpose," and the purpose of the association was more than social. Resistance to the "muscling in" by Naardi and Greene showed that the common purpose, business in nature, was to carry on and control gambling activities.

The evidence outlined above also permits the jury to reasonably infer that the group's gambling activities had been carried on for a period that antedated May 1976 and remained in operation during 1977. Such a finding satisfies the second characteristic of an enterprise: that it "function as a continuing unit."

Additional evidence supports the permissible findings of both the group's common purpose and its continuation over a period of time. By September 1977 Jack White was talking about Greene's associates as well as Greene. In his statement, intercepted by court-authorized electronic surveillance on September 24, 1977, Jack White first referred to Danny Greene as "the fucking Irishman," and then referred to his associates:

> Then the rest of the fuckin' cocksuckers. They're on the West Side. They're all with 'em, y'know. Them McTaggert . . . the guy that, uh, that guy who used to work with the barbut game. He went with 'em.

Notably, White identified McTaggert (Greene's nephew) as

> [the] guy who used to work with the Barbut game. He went with 'em.

And he added, "He was working with us."

Thus White separates " 'em [them] with whom McTaggert went from "us" with whom "[McTaggert] was workin'." From White's statements the triers of the fact reasonably may find that Daniel Greene, Kevin McTaggert, Keith Ritson and Brian O'Donnell made up one group operating Barbut games and performing other activities that were "muscling" into the "enterprise" operated by Jack White and the other defendants.

Ferritto quoted Jack White as saying that in return for his getting rid of Greene he was to get a 25 percent cut of "all the gambling and things that were going on in the Warren-Youngstown area." Thus, although the "problem" of Nardi and Greene concerned Cleveland, Jack White's admission permits the inference that the group controlled "gambling and other things" in the Warren-Youngstown area as well. This is corroborated by Tony Delsanter's residence in Warren and Ronald Carabbia's residence in Struthers, near Youngstown.

United States v. Bledsoe, 674 F.2d 647 (8th Cir. 1982), identifies the third characteristic of an "enterprise" as an "ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity." Ferritto's testimony permits the finding that White was the top man of the group. Delsanter took up with White the query of Ferritto as to "what was in it for [him]." Eventually Jack White told Ferritto of his "25% cut." Other decisions by White were recounted. For example, White told Ferritto that Calandra would get him expense money, and Carabbia later gave him $5,000. Corroboration that White was the top man of the group is supplied by the intercepted conversations which permit a finding that Calandra deferred to White at all times.

Upon the foregoing testimony there is sufficient evidence to warrant the jury's finding the existence of the alleged enterprise (hereafter the enterprise) and that defendants Licavoli, Calandra, Cisternino and Carabbia were associated with the enterprise.

While the defendants correctly argue that any conspiracy to murder Daniel Greene ended with his murder on October 6, 1977, the evidence permits the finding that the common and shared purpose of the "enterprise" continued after October 6. This inference is permissible because the gambling activities of the group, which might otherwise be found from the evidence, were less likely to continue after Greene's death on October 6.

A finding of continuation of the "enterprise" of the defendants after the death of Greene may be strongly posited

on John Calandra's statements to Jack White during the intercepted conversation of October 7, 1:36 p.m.:

> Keep an eye on this Brian. What's he gonna do? Now Brian will want to run everything.

It may be found that he is speaking of Brian O'Donnell, a lieutenant of Greene, wanting to take over gambling and other activities ("everything") from the "enterprise." White responded, "See, he's the one that cut the deal with that son of a bitch [presumably Greene]." Calandra comes back, "That's why we gotta . . . we're gonna watch him, really." It may be concluded that they are recognizing O'Donnell's threat to their enterprise.

D.

United States v. Griffin, 656 F.2d 996, 1001 (5th Cir. 1981), dealt primarily with the characteristics of an "enterprise" and reviewed the facts which sufficiently established an "enterprise." The court then dealt with proof of the conspiracy charged under §1962(d) and hel that "on much the same analysis of the record [as to enterprise]" it was "satisfied that the evidence of the conspiracy to violate the substantive offense sufficed to support the conviction under §1962(d)."

Similarly, the foregoing proof of an "enterprise" continuing from May to July 1976 until after the death of Daniel Greene sufficiently shows that the alleged RICO conspiracy to control criminal activities in the Northern District of Ohio through certain criminal activities likewise continued during the same period and after the death of Daniel Greene. Noting the statement of John Calandra to Jack White intercepted on October 7, and quoted earlier, this court ruled on June 4, 1982:

> This is highly relevant to show the continuing nature of the alleged RICO conspiracy after the death of Greene. This was evidenced by Calandra's statement to White, "Brian will want to run everything. We're gonna watch him, really."
>
> Defendant Licavoli asserts that
>
> In the first instance there must be sufficient evidence,

independent of any statements supposedly made by Liberatore about Licavoli, to establish the existence of *any* conspiracy between Liberatore and Licavoli.

Defendant Licavoli contends that apart from co-conspirator statements received into evidence under Rule 801(d)(2)(E) there is no independent proof that he and Liberatore are members of the alleged RICO conspiracy. The need for such independent proof is, of course, essential. Among other proof, the requisite membership in the conspiracy is supplied by the act of Tom Lanci, at the direction of Anthony Liberatore, delivering to Licavoli the mug shot of Kevin McTaggert soon after the death of Daniel Greene and Licavoli's acceptance of that mug shot.[2] As concluded, the evidence warrants the finding that the RICO conspiracy was then continuing. Jack White's acceptance of delivery of the mug shot from Liberatore, through Lanci, also is sufficient proof that White treated Liberatore as a member of the "enterprise."

Other linkages between Licavoli and Liberatore exist in the evidence. Raymond Ferritto testified that he was told by John Calandra at the motel that "there was two fellows, and that maybe they could be of some help in the Greene matter." At the motel (apparently another day), John Calandra made a phone call and "one hour or three-quarters of an hour later, Aratari came to the motel room." As a result, Aratari and his partner, Guiles, engaged in certain activities in stalking Greene and were on the Brainard Place scene on October 6.[3]

Aratari was introduced to John Calandra by Anthony Liberatore, undoubtedly prior to the motel meeting. Aratari testified that he was driven by Calandra, with Liberatore slouched down in the back seat, past Greene's apartment house, Greene's

2. The rule is clear that one who joins an existing conspiracy takes it as it is and is therefore accountable for the prior conduct of co-conspirators. *United States v. Sansone*, 231 F.2d 887, 893 (2nd Cir. 1956).

3. Guiles was then armed with the 30.06 Winchester rifle furnished by defendant Lanci. Guiles did not attempt to shoot Greene as he was entering the building, either because he did not see him, because he was fearful when he saw two bodyguards (not seen by anyone else), or because he did not intend to harm Greene (as he now says).

trailer on Waterloo Road, and to Cisternino's apartment on Rondel Road; Cleveland, Ohio. Aratari further testified to meeting John Calandra at a later time in the parking lot of the Ramada Inn on Euclid Avenue near Interstate 90. Liberatore had directed Calandra to go there. At the motel Calandra introduced him to two men who he has since identified as Ray Ferritto and Ronald Carabbia. The back-up role of Aratari and Guiles in the killing of Greene was discussed.

These acts of John Calandra and Liberatore, testified to by both Ferritto and Aratari, are sufficient to warrant a finding that Liberatore, through Calandra, was brought not only into the conspiracy to murder Greene but also into the RICO conspiracy charged in the indictment. Liberatore recognized the threat of Greene to the enterprise.[4]

In turn, through acts of Liberatore and acts of their own, Kenneth Ciarcia and Tom Lanci joined both the enterprise and the RICO conspiracy. Their acceptance of the directions of Liberatore, here held to be a member of the RICO conspiracy, and their own participation in the overt acts, hereafter chronicled, provide circumstantial evidence from which their association with the enterprise and the RICO conspiracy may be found. Also, if the jury finds that Anthony Liberatore and Kenneth Ciarcia each engaged in an act of bribery as a predicate act and that the predicate act furthered the affairs of the enterprise, this would corroborate their association with the enterprise and membership in the RICO conspiracy. It is not necessary that actual knowledge of each other be established among the various conspirators. *United States v. Sutherland,* 656 F.2d 1181 (5th Cir. 1981). Therefore, it is immaterial whether John Calandra, Ronald Carabbia or Pasquale Cisternino knew Tom Lanci or Kenneth Ciarcia or vice versa.

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4. As part of his conversation, Aratari stated that Mr. Liberatore told him:

> Danny Greene is a pretty strong person in this town. He's got control of the West Side. He's got the gambling. He's got the barbut, the vending machines. He's got the music, the prostitution, dope. And he's even into the union.
>
> Jack White is very upset. Jack White is afraid of him, and Jack White wants him out of the way.

In its bill of particulars "to prove the racketeering enterprise conspiracy" the government defined overt acts not set forth in the indictment. The first overt act charges that

> the named Defendants and others conspired to kill Kevin McTaggert, Keith Ritson, and Brian O'Donnell between on or about May, 1976, up to and including on or about March, 1978, in the Northern District of Ohio.

Evidence adduced would permit the triers of the fact to conclude that Kevin McTaggert (Daniel Greene's nephew), Keith Ritson, and Brian O'Donnell were associates of or worked for Daniel Greene. For example, witness Lanci described a meeting at The Flame Restaurant in September 1977 attended by himself, Anthony Liberatore and Mr. Greene, accompanied by Keith Ritson and Brian O'Donnell. At different points in the evidence they are referred to as "Danny Greene's boys" or "the Irish crew."[5]

As this court observed in its oral ruling of June 4, 1982, the jury may find "that Mr. White was personally aware of and, indeed, was taking part in the planning to get at Mr. Greene and to kill him." The jury may further reasonably find that Mr. White regarded "the rest of the . . . cocksuckers . . . on the West Side" as a threat to his enterprise (see also n. 4, *supra*), and that he was planning harm to them as well. In making such a finding, the jury could rely on Tom Lanci's testimony that after the death of Greene, Lanci, at the direction of Anthony Liberatore, delivered personally to Jack White a mug shot of McTaggert. They might find that White intended to use the mug shot to cause injury to McTaggert.

Consistent with the planning of Jack White directed at Daniel Greene and his associates, Anthony Liberatore told Tom Lanci "in regards to now that Nardi was dead, that the

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5. Ferritto links O'Donnell and Ritson with Greene. When asked, "[W]hen was the first time that you heard of Brian O'Donnell?", he responded, "I believe on the tapes, the tapes in the conversation that Greene had on the phone with his son." He then was asked about Ritson and testified, "I was told that he was one of Greene's men."

rest of them had to go."[6] Some time after the Liberatore/Lanci conversation, Liberatore, Lanci and Aratari met in the basement of Local 860, according to Tom Lanci. He stated:

> At that time, we were talking about what will have to be done now, the three of us, and then we decided, the three of us, that McTaggert, Ritson and O'Donnell would have to be taken out now.

"Taking out" meant "killing," he said. He further explained, "Aratari would do the killing, I would supply the information, and Tony would supply the money." The price was $5,000 each for McTaggert, O'Donnell and Ritson. As locations where the individuals might be located, Mr. Lanci named Curry Vending, the Anchor Inn, Travel Lodge on West 150th, the Islander Bar, and the Captain's Quarters. Lanci said that he was "in constant contact with [Aratari] from time to time either by telephone or by seeing him."

Aratari said that Tom Lanci did give him addresses to go to, and pursuant to those addresses he went to the Islander Bar about five times looking for O'Donnell. He went to O'Donnell's house, and he went to McTaggert's house waiting to see if anyone would come around. Nobody did. He went other places. On some occasions Guiles joined him. Guns were carried on at least some of these occasions, each testified.

From the evidence so far reviewed and from other pertinent evidence, the jury may reasonably find that the plan to kill Ritson, McTaggert and O'Donnell, agreed to by Liberatore, Lanci and Aratari, and Aratari's searches, assisted on some occasions by Guiles, of various locations to carry out the

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6. Referring to this conversation with Liberatore, Tom Lanci testified that "some time after the death of John Nardi . . . there was a conversation that took place." Thus he used the death of John Nardi sequentially to show that his conversation with Liberatore occurred after May 17 (the date of Nardi's death), and before August 15 (the Feast of the Assumption). As to the reference to Nardi in the quoted admission of Mr. Liberatore, the statement of Liberatore would make no sense if the reference to the death of Nardi were omitted. None of the facts of the Nardi bombing death or attribution of guilt for that death are contained in Liberatore's statement. Hence, the probative value of the full statement exceeds any possible prejudice that may result by Liberatore's quoted mention of the death of Nardi.

plans were in furtherance of the RICO conspiracy. Since they had to do with removing residual Greene crew threats to the enterprise, these activities may also be found to have furthered the enterprise's affairs.

In a hallway conversation at the Gilmour Party Center on September 24, 1977, Liberatore shifted Aratari and Guiles from stalking Ritson, O'Donnell and McTaggert to assisting the two already stalking Greene (as also testified to by Ferritto). Lanci testified that Anthony Liberatore, Tom Lanci, Victor Guiles and Louis J. Aratari met in the hallway of the Gilmour Party Center on September 24, 1977. Lanci said that this was the second time he had met Guiles. Lanci thus summarized the conversation:

> At that time, while we were having the discussion in the hallway, Tony had told myself, Guiles and Aratari that Jack [White] said that this was taking too long in regards to killing Danny Greene and he told them he was going to hook them up with another guy. Guiles said that he would need a rifle and a car.

Ronald Guiles first testified about other parts of the conversation in the hallway. He said Liberatore asked Ciarcia, who had been summoned from the hall by Lanci, about getting an automobile for Aratari and Guiles. Guiles mentioned a call made by Lanci over the telephone and stated that after the call, Lanci gave a slip of paper to Aratari directing him to go to an address where he was to ask for Diane, telling her his name was Tony DeMarco. (Guiles says this is where the 30.06 rifle was obtained.)

But then Guiles was asked:

Q. What happened then?

A. The conversation was to hurry up and get this job done and this was the first time that I heard the name of Danny Greene.

Q. Who said or mentioned hurry up and get this job done?

A. Mr. Liberatore.

Q. How did you hear the name of Danny Greene?

A. He said words to the effect that this had gone on far

> enough, Jack White wants this done, done right away. You gotta get it done.

Thus this part of Guiles' testimony substantially confirms Lanci's recollection. Referring to the same hallway conversation, Aratari also said that Liberatore quoted Mr. White as saying that he wanted Greene "out of the way now."[7]

Thus, three witnesses agree that Liberatore in words or substance quoted Jack White as saying that it was taking too long to kill Greene and that he wanted him out of the way now. From this congruent part of three recitations of the same conversation and from Liberatore's direction to Aratari to meet Calandra at the Ramada Inn in order to meet two persons later identified as Raymond Ferritto and Ronald Carabbia, the jury may reasonably find that Liberatore and White had discussed plans to kill Greene,[8] that the plan to kill Greene was related to the plan to kill his three associates and that both plans were part of the continuing purpose of the "enterprise" to control activities in the Northern District of Ohio. Hence, the jury may find that the plan to kill McTaggert, Ritson and O'Donnell, like the killing of Greene, was part of the enterprise's activities and in furtherance of the RICO conspiracy.

Overt Act C of the government's bill of particulars charges:

> C. [t]hat the named Defendants and others attempted to kill Keith Ritson and Brian O'Donnell on or about November 14, 1977, in the Northern Division of Ohio.

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7. When Guiles asked Liberatore who Jack White was, Aratari said Liberatore told Guiles "he's the number one man." Aratari also testified that Liberatore told Vic and him "that at that time he was second in command." Naming White as number one man corroborates the command structure of the enterprise.

   This admission of the chain of command by Liberatore provides the jury an added fact from which they may infer that White directed the shift of Aratari and Guiles from stalking Greene's associates to working with Ferritto an added fact from which they may infer that White directed the shift of Aratari and Guiles from stalking Greene's associates to working with Ferritto and Carabbia in their efforts to kill Greene.

8. Aratari quoted Tony Liberatore as saying, "We want you off all them people [Ritson, McTaggert and O'Donnell], and Mr. White wants you to get on Danny Greene with the other two."

Direct proof of the continuation of the RICO conspiracy after the death of Greene is provided by Liberatore and Lanci's direction to Aratari that they still wanted him to keep going — "Let's get rid of them [Ritson, O'Donnell and McTaggert]." Lanci made clear that when he said "get rid of them," he meant "kill them." Lanci's testimony was reinforced on cross-examination. Asked, "Now you didn't direct him [Aratari] to go out there on the 14th to throw a grenade or hurt Mr. Ritson, did you?", he answered:

> Well, it was part of the deal right from the beginning to get all three of them so he was on his own as far as when, where and how.

Hence, it is concluded that the jury may reasonably find that Aratari's attempt to kill Ritson and O'Donnell on November 14 by throwing a hand grenade at them at the Ritson home (as Aratari testified) was part of the enterprise's activities and in furtherance of the alleged RICO conspiracy. In view of this conclusion, defendants' motion to strike all of the testimony of witness Aratari relating to the November 14 grenading is denied. As a consequence of this ruling, the Islander Inn's Department of Liquor Ownership document, government's exhibit No. 65, is received in evidence.[9]

In its bill of particulars the government states as the final overt act:

> D. [t]hat the named Defendants and others attempted to kill Brian O'Donnell on or about February 27, 1978, in the Northern District of Ohio.

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9. The government sought to offer in evidence a Department of Liquor Control report of corporate stockholders of 7581 Pearl Road, Inc., doing business as the Islander Inn. Brian P. O'Donnell is listed as president of the corporation. He has been president since 1975.

Defendants asked that the testimony be stricken, or, in the alternative, that the court withhold its ruling on the admission of the document. After hearing arguments of counsel, the court withheld receiving the exhibit "to address this point in a little broader form." The court reserved ruling, stating:

> I will take another look at it and, particularly, in light of the arguments that have been made here and will make a ruling on this evidence at a later time.

At the pretrial hearing of March 31, 1982, defendants moved to strike all of the overt acts set forth in the government's bill of particulars. Especially, however, defendants objected to overt act "D" because on February 27, 1978, defendants Licavoli, Cisternino and Carabbia were confined in the County Jail and were on trial in the state court for the killing of Danny Greene. Moreover, Mr. Calandra was hospitalized during this period. The government responded:

> The government will establish that the impetus, the direction for the commission of these overt acts, took place before their incarceration, their hospitalization. The mere fact that they are in another area, geographic area after putting something into motion does not excuse them in any way.

The evidence, here highlighted, supports the government in its contention. Hence, evidence relating to the attempt of Louis J. Aratari to kill Brian O'Donnell on or about February 28, 1978, at which time he was arrested while in the vicinity of the Islander Bar, will not be stricken from the record. On the basis of the earlier findings that the jury may make concerning overt acts A and C, the jury may find that the evidence concerning overt act D shows that the acts of Aratari, which led to his arrest, related to the enterprise's activities and furthered the alleged RICO conspiracy.[10]

E.

In *Kotteakos v. United States,* 328 U.S. 750 (1946), the question before the Court was

> whether petitioners have suffered substantial prejudice from being convicted of a single general conspiracy by evidence which the Government admits proved not one conspiracy but some eight or more different ones of the same sort executed through a common key figure. . . .

Ibid., at 752. Thus the focus in the case was not on multiple

10. Defendants' various motions to strike the evidence relating to overt acts A, C and D of the government's bill of particulars are denied.

versus single conspiracies but on whether the harmless error doctrine

> may be extended to a situation in which one conspiracy only is charged and at least eight having separate, though similar objects, are made out by the evidence, if believed; and in which the more numerous participants in the different schemes were, on the whole, except for one, different persons who did not know or have anything to do with one another.

Ibid., at 758.

The jury had been instructed as to a single conspiracy. The Court concluded that the trial court's confusion of "the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character," *ibid.*, at 769, could not be considered harmless error. The government would not be permitted to "string together" eight "separate and distinct crimes" when the only nexus between them was a common key figure. *Ibid.*, at 773. It is important to note that the Court stated, "The jury could not possibly have found, upon the evidence, that there was only one conspiracy." *Ibid.*, at 768.

In *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981), the court dealt with the issue of multiple conspiracies in the RICO conspiracy charge context. The court clarified its holding in *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978), by repeating its reasoning:

> Under the general federal conspiracy statute, "the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes." *Braverman v. United States*, 317 U.S. 49, 53; 63 S.Ct. 99, 102; 87 L.Ed. 23 (1942). In the context of organized crime, this principle inhibited mass prosecution because a single agreement or "common objective" cannot be inferred from the commission of highly diverse crimes by apparently unrelated individuals.

> *RICO helps to eliminate this problem by creating a substantive offense which ties together these diverse parties and crimes.* Thus, the object of a RICO conspiracy is to violate a substantive RICO provision — here, to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity — and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity. The gravamen of the conspiracy charge in this case is not that each defendant agreed to commit arson, to steal goods from interstate commerce, to obstruct justice, and to sell narcotics; rather, it is that each agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes. Under the statute, it is irrelevant that each defendant participated in the enterprise's affairs through different or even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs. *To find a single conspiracy, we still must look for agreement on the overall objective.* What Congress did was to define that objective through the substantive provisions of the Act.

571 F.2d, at 902-03 (emphasis added; footnote omitted). *Sutherland, supra,* at 1192.

Thus, the court concluded that "[w]hat RICO does is to provide a new criminal objective by defining a new substantive crime." *Sutherland, supra,* at 1193. While persons might not have been tried for their separate acts under pre-RICO law, they are "properly tried together under RICO [where] the evidence establish[es] an agreement to commit a substantive RICO offense, *i.e.*, an agreement to participate in an enterprise through a pattern of racketeering activity." *Ibid.*

As defendant Licavoli points out, the Sixth Circuit "accept[ed] and agree[d] with the principles of the *Kotteakos* case" in *United States v. Sutton,* 642 F.2d 1001, 1021 (6th Cir. 1980). At the same time the court stated:

> The Supreme Court has never held that it is a requirement of a valid conviction for conspiracy that every conspirator must have "agreed, intended to conduct or participated" in every crime committed by other co-conspirators in the

> event the crime was within the scope of the conspiracy which he was proved to have joined.

Ibid., at 1017. The court then adopted much of the language quoted above from *Elliott* relating to the nature of a RICO conspiracy charge.

In *Sutherland*, the court, on the authority of *Kotteakos*, found "that the multiple conspiracy doctrine precluded the joint trial of the two multiple conspiracies on a single RICO conspiracy count." Nevertheless, applying *Kotteakos*, the court concluded that the error did not affect the "substantial rights" of the convicted defendants.

Just before it found error under *Kotteakos*, the court thus summarized *Elliott*:

> What *Elliott* does state is twofold: (1) a pattern of agreements that absent RICO would constitute multiple conspiracies may be joined under a single RICO conspiracy count if the defendants have agreed to commit a substantive RICO offense; and (2) such an agreement to violate RICO may, as in the case of a traditional "chain" or "wheel" conspiracy, be established on circumstantial evidence, *i.e.*, evidence that the nature of the conspiracy is such that each defendant must necessarily have known that others were also conspiring to violate RICO.

The jury need not be charged on multiple conspiracies in the present case. In the organization of the jury charge, before the jury might reach a question of multiple conspiracies, it must first find the presence of an "enterprise" and a single or unified RICO conspiracy. Should it determine that there is no "enterprise" within the meaning of §1961(4) or that there is no RICO conspiracy, as alleged; that is, that there was no agreement "to commit a substantive RICO offense," it would then be required to find each defendant not guilty. On the other hand, if the existence of both an "enterprise" and "a single conspiracy" are found by the jury to have been proved, under *Elliott* the finding of an agreement to commit a substan-

tive RICO offense makes the presence of multiple conspiracies immaterial.[11]

F.

Defendant Liberatore argues that there is in the record insufficient evidence to submit the bribery predicate acts issue to the jury. He argues that neither Jeffrey nor Geraldine Rabinowitz was promised anything of value by him and that the $14,900 given to them was a loan "with no strings attached."

Geraldine and Jeffrey Rabinowitz each testified that in December 1976 they had a conversation with defendant Ciarcia about a court case involving Mrs. Rabinowitz's house. At that time Ciarcia told them he "might be able to get it handled."

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11. Asserting a separate antagonistic conspiracy of Liberatore, Lanci and Aratari, defendant Carabbia and defendant Licavoli move to strike the following testimony of Mr. Aratari:

> Mr. Liberatore, he says, if you take part in taking Danny Greene out, you don't have to worry about no money in this town. Wherever you go, you will be respected, and you, Tom Lanci, and I, myself, will run this town. Licavoli don't have to know nothing about it. [Part of a larger conversation with Mr. Liberatore said by Aratari to have occurred in August.]

At this point counsel for defendant Carabbia moved to strike this testimony (joined in by defendant Licavoli) because, as he put it, "Now, Your Honor, that's — he is on his own deal now with this Liberatore." This testimony is not inconsistent with a finding of a single RICO conspiracy. Aratari himself testified as to other statements of Liberatore that dispel any contention of defendants Carabbia and Licavoli that Liberatore sought to create a group that, on its own, would kill Greene and overturn Licavoli's leadership:

> Q. Now, you remember vividly that every time you were told to go kill somebody or whatever in connection with Danny Greene, that you were told that the orders came from Mr. Licavoli; is that what you are telling the jury?
>
> A. Licavoli always had to give the permission to go on with the work.
>
> Q. And you knew that at all times, that these orders were coming from Licavoli, right?
>
> A. Mr. Liberatore made me understand that. He said he was second in command to Licavoli.

Of course, the statements of Mr. Liberatore concerning Jack White's wishes reportedly made to Lanci, Guiles and Aratari in the hallway of the Gilmour Party Center on September 24, 1977 and Liberatore's direction to Tom Lanci to deliver the mug shots of McTaggert and Bostick to Jack White after the death of Danny Greene indicate Liberatore's allegiance to Jack White.

On subsequent occasions he told them not to worry about the case; "it's being handled."

According to Geraldine Rabinowitz, in the spring of 1977 Ciarcia asked her to check three names for him in the FBI files: Licavoli, Liberatore and Ciarcia. That investigation report was turned over to Ciarcia at Noreen Orlowe's house in the presence of Tom Lanci.[12] About a week later she was asked by Ciarcia to obtain the informant key so that he could translate the numbers on the documents to names. Such a list was supplied in early July 1977.

In late June or early July she supplied Ciarcia with requested information on a wiretap. The document was turned over to Ciarcia at Noreen Orlowe's house; at that time Mrs. Rabinowitz was introduced to defendant Liberatore. She was asked by Liberatore whether she could get information on an IRS investigation on him.

At another time in July 1977, Ciarcia told Mrs. Rabinowitz that he and Liberatore were concerned about being followed and wanted a list of license plate numbers and car makes used by the FBI. A copy of such a list was given to Ciarcia in mid-August 1977. Additional documents were supplied in July and August of 1977, including a further informants list.

During that period of time, Mrs. Rabinowitz testified, she and Jeffrey Rabinowitz had undertaken the building of a home. She had conversations with Ciarcia about the building of the home "all summer long." Ciarcia told them to go ahead with the building because her court case would be resolved. She testified that at the September 24 wedding of Noreen Orlowe's daughter, Liberatore asked her "how the foundation was on [her] house."

On October 12, 1977 she and Jeffrey met with Ciarcia, Lanci and Liberatore at Orlowe's home. They explained to Liberatore that they did not have the $15,000 for the down payment on the house. Liberatore told them "he never had

12. Mrs. Rabinowitz testified that she heard someone else arrive at the house but did not know who it was. Lanci testified that the person was Liberatore.

any intention of giving [her] that kind of money. . . . He said obviously there had been a lack of communication, that Mr. Ciarcia was never told to tell [them] to go ahead with the building of the home."

Jeffrey Rabinowitz testified on cross-examination that October 12 was not the first time he had indicated he wanted money: "We told Ken after the court case was lost that if we didn't have the court case won we were going to need some money." Although he could not fix a date for the conversation, he said it was prior to the turning over of all the documents.

He further testified that on October 12 he asked Liberatore, Lanci and Ciarcia "if [they] were going to get the money to complete the transaction on [their] home." Liberatore responded "that he did not promise [them] any money and where did they get the impression that [they] had money coming?" When Jeffrey told him "Ken told us we were covered all the way," Liberatore asked, "Did I personally promise you anything?" The discussion of a loan then came up; Jeffrey testified that he "believe[d] Liberatore suggested it.

A discussion ensued as to repayment. Jeffrey told Liberatore they had $5,200 coming from the fraudulent ring claim.[13] They further "explained that Gerry had approximately $3,000 to $3,600 coming from the settlement on her house." Ciarcia told Liberatore that Jeffrey "was good for" the difference.

The following day the Rabinowitzes returned to Orlowe's home. Jeffrey was sent to Liberatore's car for a paper bag, which Liberatore handed to Geraldine. It contained $15,000. The next day Ciarcia presented the Rabinowitzes with a cashier's check for $14,900 to avoid questions as to the cash source.

Geraldine testified that at no time was there any discussion as to payment of interest, due date of the loan, or collateral. On cross-examination the following exchange occurred:

> Q. Okay, now at no time up until the day you were arrested did Mr. Liberatore ever call you and ask you for any money?

13. Liberatore asked who had the ring; Lanci responded that he did. Liberatore then told Lanci he wanted the ring so he could sell it.

A. No, he did not.

Q. At no time, when you saw him in person at any place, if you did, he never asked you for any money?

A. No, he didn't.

• • •

Q. Now, when that money was passed to you, Gerry, on October the 13th of 1977, isn't it true that Mr. Liberatore did make a statement to you to the effect that there were no strings attached, that he would never be knocking on your door or asking you for any favors?

A. That's what he said, yes.

Jeffrey Rabinowitz testified that the loan was never repaid. However, a $4,000 insurance check from the fraudulent ring claim was endorsed by Geraldine and turned over to Ciarcia.

Defendant Liberatore argues that he did not promise Geraldine or Jeffrey Rabinowitz a "thing of value," as is required by 18 U.S.C. §201(b)(3). However, the above cited testimony would permit a jury to find that Geraldine Rabinowitz was acting with the understanding that her court case was "being handled" for her. A jury may find that this constitutes a "thing of value." Further, the October 13, 1977 net payment of $14,900 by Liberatore, after he learned that Kenneth Ciarcia had told the Rabinowitzes to go ahead with the house and that they were "covered all the way" — promises made contemporaneously with the passing of the FBI stolen documents — may be found by the jury to have constituted the giving of a thing of value both by Mr. Liberatore and by Mr. Ciarcia.[14]

Defendant Liberatore further argues that the $14,900 was a loan, not a bribe. The fact that there was no discussion of

14. Liberatore argues that the resolution of the court case cannot be considered "a thing of value" because the indictment is limited to the $14,900. The indictment reads "would corruptly give and loan and promise to give and loan *things* of value, *including* approximately [14,900], more or less. . . ." (Emphasis added.) The use of *things*, plural, indicates that the government intended to offer evidence of more than just the cash. Also, the term *including* is used rather than *to wit* or *specifically*. Thus the indictment conveys that *one* of the things of value offered was the money.

interest or of a repayment schedule, no assignment of collateral, and no insistence or even request for repayment by or on behalf of defendant Liberatore would permit the jury to find that indeed the payment was not a loan but was retroactive payment for Geraldine's theft of the FBI confidential documents and her turning them over to Ciarcia and Liberatore.

While no defendant at the oral hearing argued insufficiency of the proof as to the predicate acts of conspiracy to murder Greene and the murder or aiding or abetting the murder of Greene, such contentions are deemed subsumed by the several acquittal motions. As to defendant Licavoli, the evidence reviewed in Part C, and as to defendants Calandra, Cisternino and Carabbia, the evidence reviewed in Parts C and D, is sufficient to support a finding by the jury that each of these defendants willfully and knowingly committed the predicate act of conspiracy to murder Greene and that each did murder Greene or aid and abet the murder of Greene. Turning to defendants Liberatore and Ciarcia, the evidence reviewed in Part D is sufficient to warrant a finding by the jury that these defendants conspired to murder Greene and aided and abetted the murder of Greene.

G.

18 U.S.C. §1962(c) requires that each defendant "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . . " Under §1961(5):

> A "pattern of racketeering activity" requires at least two acts of racketeering activity. . . .

Each of the six defendants contends that the predicate acts of conspiracy to murder Greene and the murder of Green cannot be considered as part of a "pattern of racketeering activity." Defendants assert that the conspiracy to murder Greene and the murder of Greene were isolated criminal activities, as opposed to criminal acts carried out in furtherance of the enterprise's affairs and the alleged RICO conspiracy. Defendants Liberatore and Ciarcia similarly argue that the bribery of Ger-

aldine Rabinowitz was an independent criminal act and not part of a pattern of racketeering activity. Taken together, defendants are contending that none of the three predicate acts of racketeering relied on by the government can be used to prove that a given defendant participated in the conduct of the enterprise's affairs "through a pattern of racketeering activity."

United States v. Turkette, 452 U.S. 576 (1981), emphasizes that after an enterprise is proven, the government must prove a "*connected* 'pattern of racketeering activity.' " *Ibid.*, at 583 (emphasis added). *Turkette* states:

> The pattern of racketeering activity is . . . a series of criminal acts as defined by the statute, 18 U.S.C. §1961(1). . . . The [pattern] is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. . . . " *Ibid.*, at 583.

A RICO defendant's involvement in the enterprise is proven by demonstrating his participation in the "connected" pattern of racketeering activity. To do this, the government must demonstrate that the defendant participated in two or more of the statutorily enumerated predicate criminal activities in furtherance of the enterprise's affairs. *United States v. Elliott*, 572 F.2d 880, 902-903 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978). "The predicate crimes need only be related to the affairs of the enterprise — they need not be related to each other." *United States v. Bright*, 630 F.2d 804, 830, n. 47 (5th Cir. 1980). Thus, a defendant participates in an enterprise "through a pattern of racketeering activity" if the government's evidence connects the predicate criminal activities committed by the defendant to the affairs of the enterprise. *United States v. Turkette*, *supra*, at 583; see also *United States v. Bright*, *supra*, and *United States v. Welch*, 656 F.2d 1039, 1061 (5th Cir. 1981).

The government has introduced sufficient evidence to allow the jury to infer that the conspiracy to kill Greene, and the murder or the aiding and abetting of the murder of Greene, furthered the aims, ambitions, and affairs of the enterprise. Raymond Ferritto's testimony, summarized above, makes it

evident, and a jury may find, that he was hired to stalk and kill Daniel Greene because Greene was "muscling in" on the enterprise's activities. Similarly, Louis Aratari testified that he was put on the "Greene case" because Greene was "getting strong" and "taking over." Aratari testified that Liberatore told him Jack White was "upset" because Danny Greene "is a pretty strong person in this town" and he had "control of the West Side." As noted above, the jury may find that Jack White's concern over this threat to the enterprise caused him (1) to conclude that he wanted "Danny Greene out of the way now"; and (2) to put Aratari and Guiles on Greene as a back-up hit team.

Similarly, evidence has been introduced which enables the jury to reasonably infer that the predicate act of bribery furthered the interests of the enterprise, *i.e.*, the enterprise identified and described in part C. FBI agents have testified that defendants Liberatore and Ciarcia obtained current investigation reports and informants lists from confidential FBI files. The jury cold reasonably infer that defendants Liberatore and Ciarcia sought the investigation reports and informants' names to protect the enterprise against damaging FBI investigations. The agents additionally testified that a list of the FBI agents' cars and license numbers was obtained. The jury could reasonably find that the license numbers were invaluable to the enterprise in monitoring and protecting itself against FBI activities.

Defendants Calandra and Licavoli argue that they cannot be "associated with an enterprise that had bribery as an objective because [they were] acquitted of the bribery charges." Defendants Calandra and Licavoli's acquittals on the bribery charges in no way preclude the finding that the bribing of Geraldine Rabinowitz furthered the aims and affairs of the enterprise. Their prior acquittals merely protect them against the jury's determining their involvement in the enterprise on the basis of participation in the predicate act of bribery.[15] All mem-

15. Their participation in the enterprise through a "pattern of racketeering activity" can be shown only by proving their involvement in the predicate acts of conspiracy to murder Greene and the murder of Greene.

bers of an enterprise need not participate in each and every criminal activity which furthers the aims and goals of that enterprise. As previously stated:

> Under the statute, it is irrelevant that each defendant participated in the enterprise's affairs through differet, even unrelated crimes, so long as we may infer that each crime was intended to further the enterprise's affairs.

United States v. Elliott, 571 F.2d, at 902-903.[16] See also *United States v. Sutton, supra,* at 1037.

In conclusion, there is sufficient evidence in the record for the jury to tie the conspiracy to murder Greene, the murder of Greene, and the bribing of Geraldine Rabinowitz into the enterprise's affairs. Therefore, these three predicate acts may be used to show that the various defendants participated in the enterprise's affairs through a pattern of racketeering activity.

H.

Defendants contend that the government has failed to prove the requisite nexus between the enterprise's activities and interstate commerce. Under §1962(c), defendants must be employed by or associated with

> [an] enterprise engaged in, or the activities of which affect, interstate or foreign commerce. . . .

"It is the enterprise, not the individual defendant, which must engage in or affect interstate commerce." *United States v. Groff,* 643 F.2d 396, 400 (6th Cir. 1981).

The government's evidence establishes that the affairs of

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16. Further proof that the predicate acts of conspiracy to murder Greene, the murder of Greene, and the bribery of Geraldine Rabinowitz were part of a "pattern of racketeering activity" was introduced in the evidence relating to the overt acts in furtherance of a plan to kill Kevin McTaggert, Keith Ritson and Brian O'Donnell. See part E, *supra.* Licavoli's statement of September 24, 1977 concerning the "West Side cocksuckers" can be read as showing that the enterprise viewed McTaggert, Ritson and O'Donnell as part of Danny Greene's gang. The enterprise's goal of eliminating the entire Greene gang helps demonstrate that the killing of the gang's leader, Danny Greene, was integral to the ongoing objective of controlling criminal activities and not an isolated event unrelated to the enterprise's affairs and purposes.

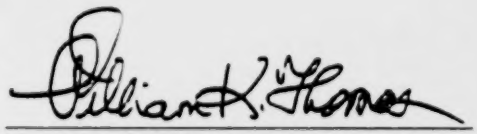
the enterprise affected interstate commerce. In *United States v. Allen*, 656 F.2d 964 (4th Cir. 1981), the use of out-of-state supplies in a bookmaking operation "provided a sufficient nexus between the enterprise and interstate commerce to invoke RICO." In this case Raymond Ferritto traveled from Pennsylvania to Ohio to engage in the enterprise's affairs. Durin his trips he stayed in hotels and used his credit card. A blue Plymouth car used by Mr. Ferritto was driven to Pennsylvania, and a title was obtained fraudulently under a name other than Raymond Ferritto. *Cf. United States v. Altomare*, 625 F.2d 5, 8 (4th Cir. 1980).

Moreover, the enterprise obtained information about Danny Greene through the use of an illegal phone tap. Raymond Ferritto testified that such a tap was placed on Mr. Greene's phone. When Greene's girl friend called to make a dental appointment for him, the call was intercepted, and the information was used in planning the Brainard Place bombing.

Thus, in carrying out its activities, the enterprise affected interstate commerce as required by §1962(c).

On the grounds discussed and on all other grounds advanced by each defendant, the Rule 29 acquittal motion of each defendant is overruled.

IT IS SO ORDERED.



U. S. DISTRICT SENIOR JUDGE

APPENDIX E: RELEVANT RULES AND STATUTES

I. Federal Rules of Criminal Procedure

Rule 14. Relief From Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Rule 30. Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Rule 31. Verdict

(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

Rule 404

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same; . . .

Rule 801

* * *

(d) Statements which are not hearsay. A statement is not hearsay if —

* * *

(2) Admission by party-opponent. The statement is offered against a party and is

* * *

(E) A statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

II. Revised Code of Ohio

§2923.01. Conspiracy

(A) No person, with purpose to commit or to promote or facilitate the commission of aggravated murder or murder, kidnapping, compelling prostitution or promoting prostitution, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or a felony offense of unauthorized use of a vehicle, corrupting another with drugs, trafficking in drugs, theft of drugs, or illegal processing of drug documents shall do either of the following:

(1) With another person or persons, plan or aid in planning the commission of any such offense;

(2) Agree with another person or persons that one

or more of them will engage in conduct which facilitates the commission of any such offense.

• • •

(F) A person who conspires to commit more than one offense is guilty of only one conspiracy, when such offenses are the object of the same agreement or continuous conspiratorial relationship.

(G) When a person is convicted of committing or attempting to commit a specific offense or of complicity in the commission of or attempt to commit such offense, he shall not be convicted of conspiracy involving the same offense.

III. Title XVIII, United States Code

§2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which, if directly performed by him or another, would be an offense against the United States, is punishable as a principal.

(As amended Oct. 31, 1951, c. 655, §17b, 65 Stat. 717)

§1961. Definitions

As used in this chapter —

(1) "Racketeering activity" means

(A) Any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year;

(B) Any act which is indictable under any of the following provisions of Title 18, United States Code: §201 (relating to bribery); §224 (relating to sports bribery);

§§471, 472 and 473 (relating to counterfeiting); §659 (relating to theft from interstate shipment) if the act under §659 is felonious; §664 (relating to (relating to embezzlement from pension and welfare funds); §§891-894 (relating to extortionate credit transactions); §1084 (relating to the transmission of gambling information; §1341 (relating to mail fraud); §1343 (relating to wire fraud); §1503 (relating to obstruction of criminal investigations); §1511 (relating to the obstruction of State or local law enforcement); §1951 (relating to interference with commerce, robbery, or extortion); §1952 (relating to racketeering); §1953 (relating to interstate transportation of wagering paraphernalia); §1954 (relating to unlawful welfare fund payments); §1955 (relating to the prohibition of illegal gambling businesses); §§2314 and 2315 (relating to interstate transportation of stolen property); §§2341-2346 (relating to trafficking in contraband cigarettes); or §§2421-2424 (relating to white slave traffic);

(C) Any act which is indictable under Title 29, United States Code, §186 (dealing with restrictions on payments and loans to labor organizations) or §501(c) (relating to embezzlement from union funds); or

(D) Any offense involving fraud connected with a case under Title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States:

• • •

(3) "Person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "Enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union

or group of individuals associated in fact although not a legal entity;

(5) "Pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

§1962. Prohibited activities

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

FILED
MAY 29 1984
ALEXANDER L. STEVAS,
CLERK

Nos. 83-1573, 83-1657 and 83-1801

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN P. CALANDRA, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES T. LICAVOLI, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY LIBERATORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were properly convicted of racketeering conspiracy, in violation of 18 U.S.C. 1962(d).

2. Whether the trial court erred in denying petitioner Licavoli's motion for a severance.

3. Whether the trial court's evidentiary rulings were correct.

4. Whether the trial court correctly instructed the jury concerning the predicate offenses of conspiracy and murder.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1573

JOHN P. CALANDRA, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (83-1573 Pet. App. A1-A26) is reported at 725 F.2d 1040. Relevant opinions

of the district court (83-1573 Pet. App. A27-A57, A60-A79; 83-1657 Pet. App. A26-A72; 83-1801 Pet. App. A38-A63) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1984. A petition for rehearing filed by petitioner Calandra was denied on February 17, 1984, and his petition for a writ of certiorari (No. 83-1573) was filed on March 23, 1984. On March 6, 1984, Justice O'Connor extended the time within which petitioner Licavoli could file a petition for a writ of certiorari to and including April 8, 1984 (a Sunday), and his petition (No. 83-1657) was filed on April 9, 1984. A petition for rehearing filed by petitioner Liberatore was denied on March 5, 1984, and his petition for a writ of certiorari (No. 83-1801) was filed on May 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Two sections of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 and 1962, are reproduced at 83-1573 Pet. App. A82-A86.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioners and three co-defendants, Pasquale Cisternino, Ronald Carabbia, and Kenneth Ciarcia, were convicted of conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d). Petitioner Licavoli was sentenced to ten years' imprisonment. Petitioners Calandra and Liberatore were each sentenced to 14 years' imprisonment.[1]

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[1] Co-defendants Cisternino and Carabbia were each sentenced to 12 years' imprisonment; co-defendant Ciarcia was sentenced to ten years' imprisonment.

1. The evidence at trial showed that between 1976 and 1978 petitioner Licavoli was a leader of organized crime in Cleveland, Ohio; petitioners Calandra and Liberatore played supervisory roles and co-defendants Carabbia, Cisternino, and Ciarcia played subsidiary roles in the organization. Throughout this period, petitioners and their co-defendants sought to establish control over criminal activities in the area by means of murder, wiretapping, and bribery. Pet. App. A2-A3.[2]

a. In the spring of 1976, Licavoli decided to have Danny Greene killed in order to eliminate competition from Greene's criminal activity in the West Cleveland area. Licavoli had a colleague, James Fratianno, contact Raymond Ferritto for the purpose of hiring him to murder Greene (Tr. 1662-1663). After a series of meetings with Licavoli, Calandra, and several of the co-defendants, Ferritto traveled to Cleveland to stalk Greene and, with the aid of Cisternino and Carabbia, to determine his pattern of activities. In August 1977, Ferritto asked Licavoli for money to cover his expenses. Licavoli replied that he would speak with Calandra, who would provide Ferritto with some money. Several days later, in the presence of Calandra, Carabbia gave Ferritto $5,000 to defray expenses he had incurred. Licavoli also promised Ferritto that when the murder was accomplished Ferritto would receive 25% of the proceeds of gambling activities in the Warren and Youngstown areas. Pet. App. A3; Tr. 1725-1726, 1734-1735, 2333-2334. During September 1977, Ferritto and Cisternino attempted unsuccessfully to kill Greene by placing a bomb outside the door of his apartment (Tr. 1751-1757, 2378-2379).

During the same period, Liberatore and an associate, Thomas Lanci, recruited Louis Aratari, an ex-convict who worked for Liberatore, to "tak[e] Danny Greene out with a gun" (Tr. 3115) and to murder five of Greene's

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[2] "Pet. App." refers to the appendix to the petition in No. 83-1573, unless otherwise indicated.

henchmen, including his son (Tr. 3199-3202, 6574). Aratari agreed to commit the murders for $5,000 each and a share in the proceeds of the gang's activities (Tr. 3200-3202). He and a partner, Vic Guiles, then began to stalk Greene. At one point, Liberatore and Calandra showed Aratari some of the places Greene frequented, including his "headquarters" (Tr. 3122-3126). Calandra explained on that occasion that "the other two guys," Ferritto and Carabbia, needed a "back-up team" because, whenever they were in front of a location, Greene would leave by the back (Tr. 3124). Calandra arranged for Ferritto to meet Aratari at a hotel, where they discussed strategies for killing Greene and agreed that Aratari and Guiles would serve as the back-up team for Ferritto and Carabbia (Tr. 1766, 2338-2344, 3139-3147). Thereafter, the two teams made plans to kill Greene when he left or entered his apartment building and to murder his associates with a hand grenade (Tr. 3267-3270, 4911-4913).

On Monday October 3, 1977, Carabbia called Ferritto and set up a meeting for the following day with Licavoli, Calandra, and Cisternino (Tr. 1760-1763, 2354-2355). At the meeting, the defendants, who had wiretapped Greene's telephone, played a recording of Greene's girlfriend making a dental appointment for him for the following Thursday (Tr. 1764-1765, 2355-2356). On Wednesday Carabbia met with Aratari and Guiles. He explained that he had an "inside lead on Danny Greene" and that Greene would be going to the dentist the next day. Tr. 3342, 4933.

On the date of Greene's dental appointment, Cisternino and Ferritto constructed a bomb. Ferritto then drove to the vicinity of the dentist's office with the device in his car; Carabbia followed in a second car with a box into which the device was to be placed. Aratari and Guiles, armed with a high powered rifle, arrived in another car supplied by Ciarcia. The plan was for Guiles to shoot

Greene if possible, with the bomb as a back-up measure. Pet. App. A4.

When Greene arrived for his appointment and entered the dentist's office, Guiles had no opportunity to shoot him. When a parking space opened next to Greene's car, Ferritto placed the bomb in the box on the side of Carabbia's car and parked that vehicle next to Greene's car. When Greene emerged from his appointment, Ferritto and Carabbia drove away in Ferritto's car, and Carabbia detonated the bomb with a remote control device. Pet. App. A4-A5; Tr. 1795-1800, 2370-2372. Greene died as a result of the explosion, and Greene's and Carabbia's cars were destroyed (Tr. 2944, 4597, 4624). The following day, in a conversation intercepted by law enforcement authorities pursuant to a court order, Calandra and Licavoli discussed the bomb and the need to watch out for one of Greene's henchmen (GX 120).

b. During the period covered by the indictment, Geraldine Rabinowitz worked as a file clerk in the Cleveland office of the FBI. Her future husband worked at an automobile dealership where Ciarcia was sales manager (Tr. 538-539). In the spring of 1977, Ciarcia asked that Rabinowitz obtain confidential FBI information concerning investigations of himself, Licavoli, or Liberatore (Tr. 213-214). After some initial hesitation, Rabinowitz furnished Ciarcia with an investigative report on Licavoli (Tr. 214-215, 217-218). Ciarcia showed the documents to Liberatore and made photocopies for him (Tr. 6531-6539). Rabinowitz subsequently agreed to obtain the names of the informants who had furnished the information contained in the report (Tr. 225-229, 243-244). She also furnished Ciarcia and Liberatore with confidential information about wiretaps, license plate numbers of FBI surveillance vehicles, and identities of other informants (Tr. 244-260). During this period Ciarcia promised that he would assist Rabinowitz in obtaining a downpayment on a house for her and her husband (Tr. 313, 549-

550). Liberatore later delivered $15,000 in cash to Rabinowitz to cover the downpayment (Tr. 593-598, 604-609). No interest or schedule of repayment for the loan was set, and no provision was made for collateral (Tr. 916-917).

2. Before the trial in this case, petitioners and their co-defendants were tried in state court for aggravated murder. Cisternino, Carabbia, and Ciarcia were convicted, while Licavoli and Calandra were acquitted; the jury was unable to reach a verdict in the trial of Liberatore.

In May 1979, petitioners, their co-defendants, and Thomas Lanci were charged in a four-count indictment by a federal grand jury (83-1801 Pet. App. A27-A37). Count 1 was the racketeering conspiracy charge at issue in this case. The alleged underlying predicate acts included, inter alia, conspiracy to murder Daniel Greene, murder and aiding and abetting the murder of Greene, and bribery of an FBI employee.[3] The indictment also charged the defendants with conspiracy to commit bribery and with two counts of bribery, based on the scheme to obtain FBI information from Geraldine Rabinowitz. The district court severed the bribery and bribery conspiracy counts and set them for trial first. Licavoli and Calandra were acquitted at that proceeding. Liberatore was convicted on the bribery conspiracy count and on one of the two substantive bribery counts.[4]

The district court then proceeded to trial on the racketeering conspiracy count. Prior to trial, the court ruled that the acquittal of Licavoli and Calandra on the bribery charges barred the government from relying on acts of

[3] Count 1 also alleged that the defendants conspired to murder Greene's associate, John Nardi. However, the district court ruled that this scheme was part of a single conspiracy to murder. Pet. App. A47-A54.

[4] Ciarcia pleaded guilty to the bribery counts; Lanci was convicted on two of the counts; Cisternino and Carabbia were acquitted.

bribery to support the racketeering conspiracy charge against them, leaving murder and conspiracy to commit murder as the only remaining predicate acts in their cases. 83-1801 Pet. App. A51-A58.[5] The court denied the motion of Licavoli and Calandra to sever their cases, but instructed the jury that it should not consider any testimony by Rabinowitz in connection with the case against Licavoli and Calandra.

At the close of the government's case, and again following their convictions, petitioners filed motions for judgments of acquittal pursuant to Fed. R. Crim. P. 29. The court denied those motions, rejecting arguments that a conspiracy to commit murder cannot constitute a predicate racketeering act under 18 U.S.C. 1961 and that the offenses of murder and conspiracy to commit murder cannot constitute separate racketeering predicate offenses because they merge upon conviction for the former offense under Ohio law (Pet. App. A27-A57). See also 83-1657 Pet. App. A42-A72.

3. The court of appeals affirmed (Pet. App. A1-A26). It rejected petitioners' claims that conspiracy to murder could not constitute a racketeering predicate offense and that murder and conspiracy to commit murder could not constitute separate racketeering predicate offenses (*id.* at A6-A12). The court also held (*id.* at A12-A13) that double jeopardy and collateral estoppel principles did not bar the use of murder as a predicate offense for the RICO prosecution, even though petitioners Licavoli and Calandra had been acquitted in state court, citing *United States* v. *Frumento*, 563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978). In addition, the court rejected the contention of Licavoli and Calandra that the district court erred in denying their motion for a severance and

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[5] The district court ruled (83-1801 Pet. App. A55) that in Liberatore's case principles of collateral estoppel required dismissal of the RICO predicate act that arose out of the same conduct as the substantive bribery charge on which he had been acquitted.

that they were prejudiced by evidence offered against their co-defendants concerning the bribery of Geraldine Rabinowitz (Pet. App. A20-A23).

The court of appeals also rejected claims that prior testimony of Ferritto should not have been admitted at trial (Pet. App. A13-A17); that double jeopardy principles barred the government from using bribery as a RICO predicate offense (*id.* at A18-A20); and that the district court erred in refusing to excuse a juror who discovered during the trial that he was acquainted with a government witness (*id.* at A23-A24). The court summarily rejected petitioners' claims that they were prejudiced by various evidentiary rulings, including admission of co-conspirator statements, references to court-ordered electronic surveillance of Licavoli, and references to participation of government witnesses in the Witness Protection Program (*id.* at A20).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Thus, no further review is warranted.

1. Petitioners advance a number of different theories in support of their contention (83-1573 Pet. 5-19; 83-1657 Pet. 19-30; 83-1801 Pet. 9-20) that they could not be convicted of racketeering conspiracy.

a. Petitioner Calandra contends (83-1573 Pet. 5-10) that, because he was acquitted in state court of the murder of Greene, principles of double jeopardy and collateral estoppel preclude use of that murder as a predicate offense supporting his racketeering conspiracy conviction. The court of appeals properly rejected this contention (Pet. App. A12-A13).

It is settled law that an acquittal in state court does not bar a subsequent prosecution based on the same conduct in federal court. See *United States* v. *Wheeler*, 435 U.S. 313, 316-320 (1978); *Rinaldi* v. *United States*, 434

U.S. 22, 28 (1977); *Abbate* v. *United States*, 359 U.S. 187 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121, 128-139 (1959); *United States* v. *Lanza*, 260 U.S. 377 (1922). As the Court explained in *Lanza* (*id.* at 382), "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The * * * double jeopardy * * * forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority."[6]

The Third Circuit, in *United States* v. *Frumento*, 563 F.2d 1083, 1087 (1977), cert. denied, 434 U.S. 1072 (1978), rejected a claim virtually identical to that raised here. The court correctly noted in *Frumento* that the RICO statute does not punish the same crimes as state law. Instead, 18 U.S.C. 1962 establishes a federal crime—racketeering—that is merely defined in part by reference to state law crimes. Moreover, it is most unlikely that Congress would have wished an acquittal in state court to bar a federal racketeering prosecution based on the same offense. If that were the rule, federal prosecutions could be defeated by ineffective prosecution or even corrupt collusion by state officials, or by state procedural nuances, such as restrictive evidentiary rules.[7]

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[6] Thus, contrary to petitioner Calandra's contention (83-1573 Pet. 7), the principle that barred use of the federal bribery offenses of which he had been acquitted was inapplicable to the state murder charge.

[7] Relying on *Bartkus* v. *Illinois*, *supra*, petitioner Liberatore contends (83-1801 Pet. 16-20) that the dual sovereignty principle is inapplicable here because of pervasive federal involvement in the state prosecution. Since Liberatore was not acquitted of Greene's murder (because the jury was unable to reach a verdict in his case), double jeopardy principles would not bar his reprosecution. See, *e.g.*, *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978). Moreover, although the Court noted in *Bartkus* that the state prosecution there was not a "sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution" (359 U.S. at 124), it clearly did not mean thereby to restrict coopera-

b. Petitioners also claim (83-1573 Pet. 10-15; 83-1357 Pet. 26-30; 83-1801 Pet. 9-12) that, by virtue of the operation of Ohio law, the government failed to prove two separate predicate acts of racketeering activity. A conviction under RICO requires proof of the commission of, or conspiracy to commit, at least two acts of racketeering activity. See 18 U.S.C. 1962(c) and (d); 18 U.S.C. 1961(5).[8] Racketeering activity is defined in 18 U.S.C. 1961(1)(A) as, inter alia, "any act or threat involving murder * * *, which is chargeable under State law and punishable by imprisonment for more than one year * * *." Under federal law, a defendant can be convicted of both a substantive offense and conspiracy to commit that offense. See, *e.g.*, *Iannelli* v. *United States*, 420 U.S.

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tion between federal and state law enforcement authorities in investigating and prosecuting acts that violate the laws of both sovereigns. The district court expressly found (Pet. App. A70-A72) that the federal-state cooperation in this case (which consisted primarily of sharing of evidence and expert witnesses) was not of the type that would convert the state prosecution into a sham or cover for a federal prosecution. See also *Bartkus*, 359 U.S. at 122-123.

[8] 18 U.S.C. 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. 1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. 1961(5) provides that, as used in the RICO statute,

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity[.]

770, 777-778 (1975). However, Ohio Rev. Code Ann. § 2923.01(G) (Page 1982) provides that

> [w]hen a person is convicted of committing or attempting to commit a specific offense or of complicity in the commission of or attempt to commit such offense, he shall not be convicted of conspiracy involving the same offense.

Petitioners contend that, because they could not be convicted in Ohio courts of both the murder of Greene and conspiracy to commit that murder, violations of Ohio statutes prohibiting these offenses cannot constitute separate predicate acts for purposes of the federal racketeering statute.

The court of appeals properly rejected this claim (Pet. App. A9-A12). As the court observed (*id.* at A10, A11), although an individual cannot be convicted of, or sentenced for, both murder and conspiracy to commit murder under Ohio law, those offenses are "separately chargeable under [Ohio] law," and each is "punishable by imprisonment for more than one year."[9] The RICO statute does not require that offenses charged as predicate acts be subject to cumulative punishments under state law. Thus, it is no defense to a RICO charge that an Ohio court could not enter separate judgments or impose cumulative sentences for conspiracy and the related substantive offense.[10]

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[9] The crime of aggravated murder is defined in Ohio Rev. Code Ann. § 2903.01 (Page 1982). The crime of conspiracy to murder is defined in *id.* § 2923.01.

[10] Calandra (83-1573 Pet. 12-14) and Liberatore (83-1801 Pet. 11) err in relying on *United States* v. *Phillips*, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982), to support their contention that the murder and conspiracy offenses merged for purposes of the racketeering statute. In *Phillips*, the court held that under 21 U.S.C. 841(a)(1), distribution of marijuana and possession of the same marijuana with the intent to distribute it constituted the same offense when they were both part of a single

Moreover, variations on the relationship between conspiracy and the underlying substantive offense under state law do not control the definition of racketeering acts under federal law. As the court of appeals observed (Pet. App. A11), the reference to state law in the racketeering statute is for the purpose of defining the conduct prohibited. It is not meant to incorporate state procedural rules. See *United States v. Welch*, 656 F.2d 1039, 1058 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982); *United States* v. *Salinas*, 564 F.2d 688, 690-693 (5th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978); *United States* v. *Frumento*, 563 F.2d at 1087 n.8A; *United States* v. *Brown*, 555 F.2d 407, 418 n.22 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978). Thus, the fact that petitioners could not be convicted separately for particular offenses in state court does not preclude the use of those offenses as separate predicate acts under the RICO statute, especially since, as noted above (page 10 *supra*),

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act and that they could not be charged as separate acts of racketeering in such circumstances. Here the conspiracy to murder and the murder itself clearly did not constitute a single act. The court in *Phillips* noted that the RICO statute required that each racketeering act constitute a "separate crime[]," but was careful to point out that separate crimes need not "be in the context of independent schemes or objectives" (664 F.2d at 1038). Because conspiracy and the related substantive offense are "separate crimes" under both Ohio and federal law, the rationale of *Phillips* is inapplicable here.

Nor is it of consequence that the reviser's note to the Ohio statute prohibiting complicity (Ohio Rev. Stat. Ann. § 2923.03 (Page 1982)) states that an accomplice is one who solicits, procures, or conspires with another to commit an offense, aids or abets its commission, or causes an innocent or irresponsible person to commit the offense. See 83-1573 Pet. 12. The trial court here did not define the offense of murder in terms of conspiring; rather, it discussed aiding and abetting murder in terms of willful participation in commission of the murder (C.A. App. 564-566). As the court below observed (Pet. App. A10-A11), Ohio has adopted the common law view that conspiracy and the substantive crime are separate offenses, even though it has now chosen to prohibit cumulative convictions and punishments.

conspiracy and the substantive object offense are separate crimes under federal law.[11]

c. Petitioner Licavoli contends (83-1657 Pet. 23-26) that, in any event, 18 U.S.C. 1961(1) does not embrace conspiracy to commit murder as a racketeering predicate offense. The court of appeals properly rejected that contention (Pet. App. A6-A9).

As this Court recently reiterated in *Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 4 (quoting

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[11] Licavoli errs in relying (83-1657 Pet. 29-30) on *United States* v. *Mason*, 213 U.S. 115 (1909), to support his contention that merger of the murder and conspiracy offenses under state law should govern the federal racketeering prosecution. In *Mason* the defendants were charged with conspiring to hinder or obstruct federal officers in the exercise of rights secured to them under the law of the United States and with murdering a federal officer as part of the conspiracy. The conspiracy was alleged to violate Rev. Stat. § 5508 (1875 ed.). A companion provision, Rev. Stat. § 5509 (1875 ed.), provided that "if in the act of violating any provision in either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed." See 213 U.S. at 119. The Court noted (*id.* at 123) that the question before it—the effect of the defendants' acquittal of murder in state court—was a narrow one, involving "an inquiry as to the meaning and scope of § 5509." It held that, because the defendants had been acquitted of murder by the state courts, Section 5509 was inapplicable. The Court reasoned that "[t]he murder in question, if committed at all, was, as a distinct offense, a crime only against the State, and after the defendants were acquitted of that crime by the only tribunal that had jurisdiction of it *as an offense against the State*, it is to be taken that no such crime of murder as charged in the indictment was in fact committed by them." 213 U.S. at 124 (emphasis in original).

The holding in *Mason* is inapposite in the context of the RICO statute, which does not merely adopt for sentencing purposes "a distinct offense, a crime only against the State" (213 U.S. at 124). Rather, the RICO statute defines criminal activity punishable under federal law by reference to state law to identify the type of activity that is federally prohibited. See *Frumento*, 563 F.2d at 1087 (noting that "[t]he murder at issue in *Mason* did not constitute an offense against the United States").

United States v. *Turkette*, 452 U.S. 576, 580 (1981)), "'[i]n determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as exclusive."'" 18 U.S.C. 1961(1)(A) broadly defines as racketeering activity "any act or threat involving murder [or other enumerated generic crimes] which is chargeable under State law and punishable by imprisonment for more than one year." Conspiracy to commit murder, an offense prohibited by Ohio law and punishable by imprisonment for over a year, plainly falls within the literal terms of that section. See Pet. App. A6.

The holding of the court of appeals is in accord with decisions of other courts of appeals, which have concluded that conspiracy can constitute a predicate offense in the context of Section 1961(1)(A) and analogous provisions of the RICO statute. See *United States* v. *Ruggiero*, 726 F.2d 913, 921 (2d Cir. 1984) ("conspiracy to commit murder qualif[ies] as a RICO predicate act under Group A, § 1961(1)(A)"); *United States* v. *Welch*, 656 F.2d at 1063 n.32 (the language of subsection A appears to contemplate conspiracy to commit murder); see also *United States* v. *Brooklier*, 685 F.2d 1208, 1216 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983) (conspiracy to obstruct, delay, or affect commerce by robbery, extortion or physical violence constitutes a predicate act under 18 U.S.C. 1961(1)(B)); *United States* v. *Phillips*, 664 F.2d at 1015 (conspiracy to import drugs may properly be alleged as a predicate act of racketeering under 18 U.S.C. 1961(1)(D)); *United States* v. *Weisman*, 624 F.2d 1118, 1123-1124 (2d Cir.), cert. denied, 449 U.S. 871 (1980) (conspiracy to commit securities fraud or bankruptcy fraud qualifies as predicate act under Section 1961(1)(D)).[12]

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[12] Licavoli errs in relying on *United States* v. *Bagaric*, 706 F.2d 42, 62 n.17 (2d Cir. 1983), cert. denied, Nos. 82-6911, 82-6925 (Oct.

Licavoli notes (83-1657 Pet. 23-24) that one of the precursors of the RICO statute defined criminal activity as any one of a number of enumerated generic crimes and "any conspiracy to commit any of the foregoing offenses." He contends that omission of the reference to conspiracy in the final version of the statute the following year demonstrates Congress's intent not to make conspiracy a separate act of racketeering (83-1657 Pet. 24). But that omission does not constitute the sort of "clearly expressed" legislative history that would defeat the otherwise "conclusive" effect of the statute's unambiguous language. See *Russello* v. *United States*, slip op. 4, 10. The RICO legislation that was ultimately enacted was significantly different from the bills of the previous year, and the legislative history contains no explanation for the particular omission on which Licavoli relies. See Pet. App. A41. In view of the broad language used in the final version of the legislation, the reference to conspiracy may have been omitted simply because it was regarded as redundant. Moreover, in view of Congress's purpose to reach high-ranking racketeers, as well as "street-level" employees of racketeering enterprises, it seems most unlikely that Congress meant to immunize those who do not personally involve themselves in racketeering activities, but participate only as conspirators. See Pub. L. No. 91-452, § 904(a), 84 Stat. 947, 18 U.S.C. 1961 note (provisions of RICO are to "be liberally construed to effectuate its remedial purposes"); *Russello* v. *United States*, slip op. 10-11; *United States* v. *Ruggiero*, 726 F.2d at 919 (legislative purpose of RICO statute

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3, 1983), No. 83-5206 (Oct. 17, 1983), to support his claim that the Second Circuit has limited the reasoning of *Weisman* to conspiracies charged as predicate acts under Section 1961(1)(D). In *United States* v. *Ruggiero*, 726 F.2d at 918-919, 921, the Second Circuit held that its reasoning in *Wiesman* extends to murder conspiracies charged as predicate acts under Section 1961(1)(A).

supports conclusion that conspiracy to murder constitutes an act of racketeering activity under the RICO statute).

d. Petitioner Calandra maintains (83-1573 Pet. 15-19) that, at least as to a racketeering conspiracy charge under 18 U.S.C. 1962(d), conspiracy to murder and the substantive offense of murder cannot constitute the two predicate acts necessary to support a conviction. That claim is without merit.

Contrary to Calandra's claim (83-1573 Pet. 18), it is not redundant for a conspiracy charge to constitute a predicate offense for a violation of 18 U.S.C. 1962(d). As the Second Circuit explained in *United States* v. *Ruggiero*, 726 F.2d at 923, "[a] RICO conspiracy under § 1962(d) based on separate conspiracies as predicate offenses is not merely a 'conspiracy to conspire' * * *, but is an overall conspiracy to violate a substantive provision of RICO, in this case § 1962(c), which makes it unlawful for any person associated with an interstate enterprise to 'participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.'" See also *United States* v. *Zemek*, 634 F.2d 1159, 1170 n.15 (9th Cir. 1980), cert. denied, 450 U.S. 916 (1981), in which the court explained that a conspiracy may properly constitute a predicate offense in connection with a RICO conspiracy charge because "[t]he essence of a RICO conspiracy is not an agreement to commit predicate crimes but an agreement to conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering." [13]

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[13] The district court instructed the jury that, in order to convict on the RICO conspiracy count, it must find that the defendants "conspired together to violate 18 U.S.C. § 1962(c) by being associated with an enterprise engaged in activities which affected interstate commerce and the purpose of which was to control the criminal activities in various cities in the Northern District of Ohio by means of murder, bribery, and other activities" (C.A. App. 548). The court further instructed that, as an additional element, the jury must find that "the particular defendant under consideration engaged in a pattern of racketeering activity * * * by knowingly

Nor is it improper to base a RICO conspiracy on two predicate acts of racketeering that consist of conspiracy and the consummated offense. It is axiomatic that a substantive crime and conspiracy are separate offenses for purposes of prosecution and punishment. See *e.g.*, *Iannelli* v. *United States*, 420 U.S. at 777; *United States* v. *Feola*, 420 U.S. 671, 693 (1975); *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961). Conspiracy "poses distinct dangers quite apart from those of the substantive offense" (*Iannelli*, 420 U.S. at 778), including an increased likelihood that the conspiratorial objectives will be attained and that the participants will commit crimes unrelated to the original purpose for which the conspiracy was formed. See *Callanan* v. *United States*, 364 U.S. at 593-594.

The rationale that underlies this principle is particularly apt in this case. The evidence showed that petitioners engaged in a conspiracy lasting over a year and having as its objective not only the murder of a single individual, but the murder of all members of a competing criminal organization. During that period, petitioners and their henchmen planned and attempted various schemes for murdering Greene, each of which seriously jeopardized the safety of others. They recruited

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and willfully committing, or knowingly and willfully aiding and abetting, at least two acts of racketeering activity" (*id.* at 557).

This instruction is more favorable to the defendant than that prescribed by the decisions on which Calandra relies. In *United States* v. *Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983), and *United States* v. *Barton*, 647 F.2d 224, 237 (2d Cir.), cert. denied, 454 U.S. 857 (1981), the courts held that, in the context of a RICO conspiracy charge, it was sufficient for the government merely to demonstrate that the defendant agreed to perform at least two predicate acts. See also *United States* v. *Carter*, 721 F.2d 1514, 1531 (11th Cir. 1984). Here the instructions required the jury to find that petitioners willfully committed, or aided and abetted in the commission of, two acts of racketeering activity, not merely that they agreed to the commission of those offenses.

numerous hit men who participated in these schemes. To view the conspiracy to murder Greene merely as part and parcel of the consummated murder for purposes of the federal racketeering statute would be particularly unrealistic on the facts of this case.

In any event, 18 U.S.C. 1961(5) simply requires "two acts of racketeering activity." It does not require that those acts be separated in time or subject matter, or that they involve different participants. See *United States* v. *Phillips*, 664 F.2d at 1038-1039; *United States* v. *Starnes*, 644 F.2d 673, 677-678 (7th Cir.), cert. denied, 454 U.S. 826 (1981); *United States* v. *Weatherspoon*, 581 F.2d 595, 601-602 (7th Cir. 1978); *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). Because the act of conspiring to commit murder and the act of murder both qualify as racketeering acts under 18 U.S.C. 1961(1), and because conspiracy and the related substantive offense constitute separate illegal acts under both federal and state law, the statutory requirement was satisfied in this case.[14]

e. Finally, petitioner Liberatore urges (83-1801 Pet. 13-16) that, because he previously was convicted of bribery and conspiracy to commit bribery, double jeopardy principles preclude use of the same offenses as predicate acts to support his RICO conspiracy conviction. It is well established, however, that a defendant may be separately convicted and punished for substantive crimes and for a RICO violation that charges those crimes as

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[14] Licavoli also contends (83-1657 Pet. 6) that the court of appeals' statement that "[a]ll that is now required for a RICO offense is the commission of two predicate offenses * * *. No further indicia of 'enterprise' is now necessary" is contrary to this Court's decision in *United States* v. *Turkette*, 452 U.S. 576, 583 (1981). In fact, the quoted language is from Judge Merritt's concurring opinion (Pet. App. A26). Moreover, while the Court held in *Turkette* that a racketeering enterprise is distinct, for purposes of proof, from predicate racketeering offenses, it went on to observe that the proof used to establish those separate elements "may in particular cases coalesce." 452 U.S. at 583.

predicate offenses. As the court explained in *United States* v. *Rone*, 598 F.2d 564, 571 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980), "[t]he racketeering statutes were designed primarily as an additional tool for the prevention of racketeering activity, which consists in part of the commission of a number of other crimes. The Government is not required to make an election between seeking a conviction under RICO, or prosecuting the predicate offenses only. Such a requirement would nullify the intent and effect of the RICO prohibitions." See also, *e.g.*, *United States* v. *Greenleaf*, 692 F.2d 182, 189 (1st Cir. 1982), cert. denied, No. 82-1225 (Apr. 4, 1983); *United States* v. *Hartley*, 678 F.2d 961, 991-992 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); *United States* v. *Hawkins*, 658 F.2d 279, 287 (5th Cir. 1981); *United States* v. *Boylan*, 620 F.2d 359, 360-361 (2d Cir.), cert. denied, 449 U.S. 833 (1980); *United States* v. *Aleman*, 609 F.2d 298, 306-307 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Solano*, 605 F.2d 1141, 1143 (9th Cir. 1979), cert. denied, 444 U.S. 1020 (1980).[15]

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[15] Liberatore incorrectly relies (83-1801 Pet. 15) on the decisions of the Fifth Circuit in *United States* v. *Marable*, 578 F.2d 151 (1978), and *United States* v. *Ruigomez*, 576 F.2d 1149 (1978), to support his double jeopardy claim. In those cases, the court addressed the propriety of charging a single continuing drug conspiracy in separate indictments, not the question whether a substantive offense for which a defendant is convicted can also constitute a predicate offense in a RICO prosecution. On the latter issue, the Fifth Circuit is in agreement with the holding of the Ninth Circuit in *Rone*. See *United States* v. *Hawkins*, 658 F.2d at 287.

Liberatore also claims that use of a bribery conspiracy charge as a predicate act in a RICO conspiracy count constitutes multiple prosecution for a single conspiracy (83-1801 Pet. 15-16). That claim is erroneous for the reasons we have stated in response to Calandra's argument concerning a RICO conspiracy prosecution based, in part, on a conspiracy to commit murder. See pages 16-18, *supra*. In any event, as Liberatore acknowledges (83-1801 Pet. 3), the sentence on his racketeering conviction runs concurrently with the sentences imposed on his bribery convictions.

2. Petitioner Licavoli contends (83-1657 Pet. 10-13) that he was prejudiced by the district court's decision not to sever his case from that of his co-defendants. He notes that Geraldine Rabinowitz, the FBI file clerk who received payments from other co-conspirators in exchange for confidential FBI information, mentioned his name during her testimony, although the district court had previously ruled that evidence of the bribery scheme (of which Licavoli had earlier been acquitted) could not be considered against him.

The court of appeals correctly noted (Pet. App. A21-A23) that the general rule in conspiracy cases is that persons indicted together should be tried together, particularly when the offense charged may be established against all the defendants by the same evidence. See, *e.g.*, *United States* v. *Russell*, 703 F.2d 1243, 1247 (11th Cir. 1983); *United States* v. *Parodi*, 703 F.2d 768, 779 (4th Cir. 1983); *United States* v. *Hamilton*, 689 F.2d 1262, 1275 (6th Cir. 1982), cert. denied, 459 U.S. 1116 (1983). That rule applies with full force when all defendants are charged in a RICO conspiracy count, even when, as here, they are not all named in connection with the same alleged predicate acts. See, *e.g.*, *United States* v. *Melton*, 689 F.2d 679, 686 (7th Cir. 1982); *United States* v. *Provenzano*, 688 F.2d 194, 199 (3d Cir.), cert. denied, 459 U.S. 1071 (1982) ("in a case of this nature, it is preferable to have all of the parties tried together so that the full extent of the conspiracy may be developed"); *United States* v. *Lee Stoller Enterprises, Inc.*, 652 F.2d 1313, 1319 (7th Cir.), cert. denied, 454 U.S. 1082 (1981).

The court of appeals correctly concluded that Licavoli failed to meet the "heavy burden * * * requiring a strong showing of prejudice" (*United States* v. *Davis*, 707 F.2d 880, 883 (6th Cir. 1983)) that is necessary to establish that the district court abused its discretion in denying a severance motion. Here, any potential for prejudice was reduced by the district court's redaction of the FBI

documents to remove references to Licavoli (C.A. App. 467). In addition, as the court of appeals observed (Pet. App. A22), the jury was carefully instructed that evidence of bribery was admissible only against Liberatore and Ciarcia, and there is no reason to believe that it was unable to confine its consideration of Rabinowitz's testimony to those two defendants.[16]

3. a. Following threshold determinations by the district court that petitioners had participated in a conspiracy and that statements made in furtherance of the scheme would be admissible against each of them (see Tr. 1584-1588, 2607, 2609, 2616-2617, 3108-3109), Aratari and Guiles testified about statements of Liberatore concerning the scheme. Several of the statements implicated Licavoli in the conspiracy and tended to show that he was responsible for directing the scheme. See 83-1657 Pet. 14-16. Liberatore did not testify at trial.

Licavoli maintains (83-1657 Pet. 13-18) that admission of Liberatore's out-of-court statements violated both the hearsay rule and the Sixth Amendment Confrontation Clause. This fact-bound claim was properly rejected by the court of appeals (Pet. App. A20).

Under Fed. R. Evid. 801(d)(2)(E), a statement is not hearsay if it is offered against a party and is a "statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." As Licavoli acknowledges (83-1657 Pet. 14), in order to admit statements of co-conspirators under this Rule it is necessary to show only that the defendant and the declarant were both participants in the conspiracy and that the statements in question were made in furtherance of the conspiracy. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 701 (1974); *United States* v. *James*, 590 F.2d 575, 578 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979).

[16] The trial court repeated the cautionary instruction concerning the evidence of bribery on numerous occasions. See Tr. 15-16, 201, 460-461, 482, 500-501, 539-540, 936-937, 6529-6530; C.A. App. 531, 567, 575, 578.

The district court properly concluded that each of the prerequisites for admission of Liberatore's statements was satisfied. Evidence from other sources showed that Licavoli was instrumental in directing and financing the murder of Greene (see, *e.g.*, Tr. 1677-1680, 1714-1716, 2316-2317, 2333-2335). It also established that, in furtherance of this objective, Liberatore, acting as Licavoli's lieutenant, recruited two hit men and coordinated the efforts of two assassination teams, consisting of Ferritto, Carabbia, Aratari, and Guiles. Liberatore's statements to members of those teams were plainly in furtherance of the scheme.[17]

There is no substance to Licavoli's contention that, even if they fall within the scope of Rule 801(d)(2)(E), admission of the statements violated the Confrontation Clause of the Sixth Amendment. Satisfaction of an exception to the hearsay rule does not automatically fulfill the requirements of the Confrontation Clause. See *Dutton* v. *Evans*, 400 U.S. 74, 86 (1970) (plurality opinion); *California* v. *Green*, 399 U.S. 149, 155 (1970). However, the courts are in general agreement that, in most instances, a statement that is admissible under Rule 801(d)(2)(E) will be sufficiently reliable to satisfy the Confrontation Clause, without regard to the declarant's availability for cross-examination. See, *e.g.*, *United States* v. *Ammar*, 714 F.2d 238, 256 (3d Cir. 1983), cert. denied, No. 83-319 (Oct. 31, 1983); *United States* v. *Lurz*, 666 F.2d 69, 81 (4th Cir. 1981), cert. denied, 455 U.S. 1005, 1136 (1982); *United States* v. *Peacock*, 654

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[17] In *United States* v. *Lawson*, 523 F.2d 804, 806 (5th Cir. 1975), on which Licavoli relies (83-1657 Pet. 16), the court noted that certain statements contained in wiretaps of telephone conversations admitted against him were made "with the knowledge of and on behalf of" the defendant. Rule 801(d)(2)(E) does not require such proof in connection with any co-conspirator statement. The court in *Lawson* was addressing the defendant's claim that there was insufficient evidence to show that he was a member of the conspiracy. Here there was ample evidence from other sources that Licavoli was a member of the conspiracy.

F.2d 339, 349 (5th Cir. 1981); *United States* v. *Nelson*, 603 F.2d 42, 46 (8th Cir. 1979); *United States* v. *Marks*, 585 F.2d 164, 170 n.5 (6th Cir. 1978); *United States* v. *Papia*, 560 F.2d 827, 836 n.3 (7th Cir. 1977); *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973); cf. *United States* v. *Perez*, 658 F.2d 654, 660-662 (9th Cir. 1981); *United States* v. *Wright*, 588 F.2d 31, 38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979). If the declarant is found to be a co-participant in a criminal enterprise, he has an incentive to speak truthfully in connection with matters relating to the scheme. See, *e.g.*, *United States* v. *Nelson*, 603 F.2d at 47; *United States* v. *Papia*, 560 F.2d at 836 n.3. Virtually all of Liberatore's statements at issue here concerned the mutual objective of murdering Greene and were made to the hired assassins; therefore, Liberatore had every reason to speak truthfully about Licavoli's desires.

b. Nor is there any substance to Licavoli's claims (83-1657 Pet. 5, 9-10) that the trial court erred in admitting testimony that federal agents had been instructed "to monitor only conversations dealing with criminal activity" and that it improperly vouched for the credibility of government witnesses by instructing the jury concerning the participation of those witnesses in the Department of Justice Witness Protection Program.

The testimony concerning instructions to monitor conversations dealing with criminal activity (Tr. 6017) was in response to cross-examination by the defense suggesting that FBI agents acted unlawfully by indiscriminately intercepting and monitoring Licavoli's calls (Tr. 5971-5972, 5977). Under these circumstances, it was proper for the prosecution to present testimony about the scope of the surveillance warrant and the lawful manner in which it was executed in order to refute the inference of impropriety. Cf. *United States* v. *Jackson*, 509 F.2d 499, 507-508 (D.C. Cir. 1974) (testimony about execution of search warrant properly admitted). Moreover,

the trial court's immediate and comprehensive instruction to the jury concerning this testimony obviated the possibility of prejudice.[18]

During direct examination, the government elicited from several witnesses the fact that they were participants in the Department of Justice Witness Protection Program and had received subsistence allowances and other benefits from the government (see, *e.g.*, Tr. 5043-5044). The trial court subsequently instructed the jury that "[t]hrough the U.S. Marshal Service, the Attorney General of the United States is authorized to provide for the health, safety and welfare of witnesses * * * whenever in the judgment of the Attorney General testimony from or a willingness to testify by such a witness would place his life or person or the life or person of a member of his family or household in jeopardy" (C.A. App. 536). The court cautioned the jury, however, that "any decision to place a witness under the Witness Protection Program is solely an administrative decision in which no court participated" and that such participation bears only on the credibility of the witnesses and "may not be considered as any evidence or inference of guilt as to the acts charged against any of these defendants" (*id.* at 537).

Defendants often seek to impeach witnesses by showing that they received significant benefits in connection with participation in the Witness Protection Program.[19] The

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[18] The trial court instructed the jury, inter alia (C.A. App. 1218):

> the use of the term "criminal" in the answer [to the prosecutor's question] is not to be understood by the jury as offering any evidence whatsoever with reference to any of the Defendants in this case. It is merely a characterization the witness used in connection with whatever instructions he received in this matter.

[19] Indeed, Licavoli's attorney, during cross examination of a government witness, elicited substantial testimony concerning the witness's receipt of benefits from the government in connection

government may properly anticipate such impeachment by eliciting the fact that the witness was in the program, thus avoiding an inference that it has attempted to hide his possible bias. See *United States* v. *Thevis*, 665 F.2d 616, 637 (5th Cir. 1982), cert. denied, 459 U.S. 825 (1982); *United States* v. *Ciampaglia*, 628 F.2d 632, 639-640 (1st Cir.), cert. denied, 449 U.S. 956 (1980); *United States* v. *DiFrancesco*, 604 F.2d 769, 775 (2d Cir. 1979), rev'd on other grounds, 449 U.S. 117 (1980); *United States* v. *Partin*, 552 F.2d 621, 644-645 (5th Cir.), cert. denied, 434 U.S. 903 (1977).

The trial court's instruction concerning the Witness Protection Program was similar to those approved in *Partin*, 552 F.2d at 644, and *DiFrancesco*, 604 F.2d at 775. Far from constituting a "judicial vouching" for the integrity of the decision to place the witness in the program (83-1657 Pet. 10), the instruction was a carefully balanced admonition that no court had participated in the administrative decision and that the decision could not be considered in determining the question of guilt.

4. Finally, Licavoli claims (83-1657 Pet. 19-22) that the jury instructions failed adequately to distinguish between the concepts of aiding and abetting and conspiracy. As a result, he maintains, the jury could have predicated his RICO conspiracy conviction on a determination either that he aided and abetted the murder of Greene or that he participated in the conspiracy, without determining that he participated in both predicate offenses; alternatively, he suggests that the instructions could have led to a lack of juror unanimity.

Although Licavoli has not specified the portion of the charge to which his objections are directed, presumably he refers to the instruction concerning the predicate act involving conspiracy, which stated that to show that a defendant "committed the predicate act of conspiracy to

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with the Witness Protection Program (*e.g.*, Tr. 5136-5137, 5146, 5148-5149).

murder Daniel J. Greene, the government must prove * * * that such defendant planned or aided one or more defendants or co-conspirators in planning the commission of the Greene murder" (C.A. App. 563; see also *id.* at 559). That language merely advised the jury that a defendant need not have been the sole or principal architect of the conspiratorial plan in order to be found guilty of participation in the conspiracy, but could have aided in *planning* of the murder. The instruction is fully consistent with settled principles of conspiracy law and did not in any way furnish the jury with alternative grounds on which to find Licavoli guilty. See *United States* v. *Guy*, 456 F.2d 1157, 1165 & n.4 (8th Cir.), cert. denied, 409 U.S. 896 (1972).

Moreover, the court instructed the jury that, before it could convict Licavoli, it was required to find that he had committed *both* of the predicate acts charged—conspiracy to murder and the murder itself (C.A. App. 557-558). That instruction obviated any possibility that, in reaching a verdict, the jury might have found that Licavoli committed only one predicate offense or that some jurors might have based their decisions on different predicate acts than others.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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